ONTARIO
LABOUR RELATIONS BOARD
REPORTS

Annual
Consolidated Index 2007

Ontario

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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Bimonthly Series of Decisions from the
Ontario Labour Relations Board

Annual Consolidated Index 2007

EDITORS: VOY STELMASZYNSKI
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Abandonment – Bargaining Rights – Certification – Construction Industry – Delay – In 1998, Local 183 filed an application for certification for all the construction labourers of the respondent, Beamish – A vote took place and 23 of the 36 votes were challenged but the application was never disposed of – In November 2006 Local 183 brought an application for certification for the same bargaining unit – Beamish took the position that the 1998 application was still outstanding and that the 2006 application indicated Local 183's intention to withdraw the 1998 application – Beamish further argued that the Board should treat the 1998 application as having been withdrawn by Local 183, with a bar subject to subsection 7(10) of the Act – Local 183 offered no explanation for the delay or for why the 1998 application was never concluded – Absent any explanation for the delay, the Board dismissed the 1998 application as being abandoned as of the date of the present decision – The Board declined to characterize the 2006 application as a request to withdraw the 1998 application and thus determined that mandatory bars imposed pursuant to subsections 7(10) and 10(3) were not applicable – The Board did exercise its discretion pursuant to subsection 111(2)(k) and barred Local 183 for six months from the date of this decision from making an application for certification to represent the members of the bargaining unit of Beamish – Both applications (1998 and 2006) dismissed

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Abandonment – Representation Vote – Termination – Timeliness – The employer applied for termination of bargaining rights pursuant to s. 65 of the Act – The union provided the employer with notice to bargain on April 4, 2006 and promised to forward the union's available bargaining dates by the end of that month, then it transferred the file to another representative – The new union representative commenced an extended sick leave – In April of 2007, the union realized that no bargaining had occurred and sent out a notice of meeting for May 2007 – The Board found that the threshold for abandonment was not reached because the union attempted to begin bargaining once the delay was realized – However, the Board also found that the union's delay in bargaining was significant and its explanation was unsatisfactory – The Board exercised its discretion to direct a representation vote – Matter continues

TICKETMASTER CANADA LTD.; RE CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION LOCAL 343..(Nov./Dec.) 1135

Abuse of Process – Employment Standards – Practice and Procedure – In this employee application for review, the Board had issued earlier decisions describing the applicant's inappropriate, disrespectful and disruptive behaviour – Ultimately the Board was forced to cut short a hearing day because of the employee's conduct, and seek submissions from the parties as to how to proceed – The employer argued that to continue would be an abuse of process, the applicant had not pleaded a *prima facie* case or, alternatively, the applicant should provide a medical assessment of his ability to proceed – The applicant sought the Vice-Chair's recusal, an order from the Board admonishing employer counsel's behaviour, and a broader investigation into his employment and discharge (including reprisal) – The Board refused to step down, confirmed that employer counsel's conduct had been courteous and restrained, and held that the breadth of the issues before it already encompassed the remedies the applicant was seeking – The Board terminated the hearing and dismissed the application because of the applicant's conduct

NOVAFLOW SYSTEMS INC.; RE OMER A. EL SAYED AND DIRECTOR OF EMPLOYMENT STANDARDS..(Jan./Feb.) 130

Accreditation – Construction Industry – Intervenor – Standing – In this application for accreditation for all employers of employees engaged in concrete forming construction, the parties to the Carpenters' ICI collective agreement, which also engage in concrete forming construction, sought status as intervenors – The Board found that the intervenors could not be legally affected by the accreditation proceeding since the accreditation order is limited to the employers with whom the responding party has a collective agreement relationship; and where an employer is bound by both the intervenors' ICI agreement and the applicants' and respondents' agreement an accreditation order would neither detract from the bargaining rights held by the intervenors, nor expand the bargaining rights of the responding party – The Board also found nothing special or unique about this accreditation proceeding that would warrant the Board's exercise of its discretion to grant intervention by parties without a legal interest in the matter – Standing denied – Applicants' motion granted

THE ONTARIO FORMWORK ASSOCIATION; RE THE FORMWORK COUNCIL OF ONTARIO; RE CARPENTERS EMPLOYER BARGAINING AGENCY; RE CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA.......................................(Nov./Dec.) 1125

Alteration of Jurisdiction – Construction Industry – Judicial Review – Natural Justice – Practice and Procedure – The Local alleged that the Board's decision, finding just cause for the International to assume jurisdiction of the Local over a computer centre construction project in Barrie, should be quashed on a number of grounds – The Board, noting that s. 147(5) operated to stay the assumption of the Local's jurisdiction, was concerned that a full hearing might render the result inconsequential and moot, sine the project was near completion held a two day consultation in accordance with Rule 41, as the situation required a speedy resolution – The Board, having acknowledged that there were facts in dispute, determined there was sufficient uncontested material to permit it to reach an appropriate decision – The Board fashioned a specific remedy placing restrictions and conditions on the International's transfer of jurisdiction – On judicial review, the court first found that Rule 41 was not *ultra vires*, since there was no improper delegation of authority by the Chair, nor was the rule inconsistent with the scheme of the Act – The court found that the rule sets a standard that must be met before a Vice Chair may exercise their discretion in the circumstances of a particular case, and that the Rule is entirely consistent while noting that the Board "operates in a complex, dynamic, and highly fluid environment where expeditious rulings and informal and accessible procedures are often essential to maintaining the delicate balance between the parties' various interests" – Second, the court found that the Board did not deny the Local natural justice by proceeding with a consultation rather than a full hearing, since the core value embraced by the *audi alteram partem* maxim was met by the Board: providing the parties with an opportunity to be heard – The court also found it was not patently unreasonable for the Board to have chosen this procedure, since the Board was given the authority to balance the need for complete natural justice on the one hand against expedition on the other – Third, the court found that the Board did not exceed its jurisdiction by making findings of fact in the absence of any evidence, since there was evidence before it, the sufficiency and weight of which were within its exclusive jurisdiction, permitting it to make its decision – Fourth, the court found that the Board did not deny natural justice by failing to provide adequate reasons, since it provided a sufficiently adequate explanation of the process it engaged in, the conclusions it reached, on what it founded those conclusions and the results of its conclusions – Finally the court found that the Board's decision on the merits was not patently unreasonable: it was a sound and sensible decision in circumstances of acrimony that permitted the appropriate labour relations objective to be achieved, with the least intrusion on the rights of the Local's members – Application dismissed

IBEW, LOCAL 1739; RE GUILD ELECTRIC LIMITED; RE OLRB ....(May/June) 669

Alteration of Jurisdiction – Construction Industry – Trade Union – Trusteeship – After a local union withdrew from various programs of its parent union and took steps to affiliate itself with a rival union, the parent revoked the local's charter – The local claimed that the revocation violated sections 147 and 149 of the *Act* – The Board held that section 149 had no application as the parent did not attempt to retain any of the legal or institutional attributes of the local – A parent union is entitled to sever its relationship with a local, subject only to the just cause requirement of section 147 – The Board is not likely to weigh the merits of the parent's decision as long as it severs the relationship completely and does not do so for a coercive or punitive motive – The revocation of the charter would harm viable and stable collective bargaining and cause serious labour relations problems because (i) no collective agreement would apply to the geographical area under the local's jurisdiction and (ii) it would unravel a previous order made by the Board that prevented the irreconcilable differences between the parties from disrupting the entire construction industry and inflicting significant damage to the economic interests of both employers and members of the union – The parent would not be able to demonstrate just cause for the revocation of the charter unless it simultaneously took steps to transfer the rights, privileges and duties of the local to the employee bargaining agency – The Board found that the parent acted without just cause and declared the attempted revocation to be null and void

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 25..(Jan./Feb.) 101

Ambulance Services Collective Bargaining Act, 2001 – Essential Services Agreement – Interest Arbitration – Lock-Out – Strike – The union and the employer entered into an essential service agreement pursuant to the *ASCBA* where the number of employees who must work during a strike or lock-out were the exact same number that would be employed in the normal course – The employer's application asked the Board to find that "no meaningful lock-out can occur" in the circumstances and to direct binding arbitration to settle the collective agreement, while the union's application asked the Board to find that the employer had breached the essential services agreement – The Board found that for a lock-out (or strike) to be "meaningful" it must permit "the application of economic sanctions in order to further and support the collective bargaining process" – Since no employees would be locked out as a result of the essential service agreement, the Board concluded that the essential service agreement between the parties effectively precludes the employer from engaging in a lock-out – Employer's application allowed; final and binding interest arbitration directed; union's application dismissed

SUN PARLOUR EMERGENCY SERVICES INCORPORATED (ESSEX DIVISION); RE SEIU, LOCAL 1.ON .... (Mar./Apr.) 447

Ambulance Services Collective Bargaining Act, 2001 – Reference – The City of Cornwall sought a Board-ordered Essential Services Agreement (ESA) for its ambulance drivers – Shortly thereafter, the Minister of Labour asked the Board whether he had the authority to issue a "no board" report – The Union opposed the City's application to the Board on the basis that (a) the parties had agreed to settle all future collective agreements by interest arbitration if necessary; and (b) the parties had already agreed to an ESA for the current round of bargaining – The Board found that there had been no agreement to "perpetual" interest arbitration due to; (1) the lack of "clearest possible language" indicating such in the memorandum of agreement; (2) the failure of the parties' bargaining history to demonstrate the offer and acceptance of the alleged terms; (3) and the conduct of the parties that belied the existence of such an agreement – The Board found that the ESA was not agreed to by the employer as the union did not present the final ESA to the City for approval after incorporating the terms requested by the City – The City's application was allowed to proceed – The Minister was advised that he had the authority to issue a "no board" report

THE CORPORATION OF THE CITY OF CORNWALL; RE CUPE LOCAL 3251 PARA .... (Jan./Feb.) 198

Bar – Bargaining Unit – Certification – Employee – This application for certification was filed within a year of an earlier application against the same employer – Subsequent to the dismissal of the first application the employer moved its operations from Brampton to Milton (which area was not covered by the bargaining unit proposed in the first application) – Ten employees moved from Brampton to Milton and performed the same jobs – The Board found that the word "position" must be interpreted in context to avoid a result that is inconsistent with sound labour relations or the purposes of the Act – The Board found that the position of an employee is not the same unless it is with the same employer and in a geographic location covered by the scope clause of the original application – Therefore the ten employees transferred to Milton were in different positions than they held in Brampton, and they would not have been in the bargaining unit proposed in the current application had they occupied their original position – Given that the criteria set out in s. 10(3.1) had been met, the Board exercised its discretion to consider the current application since only 10 of the 30 employees at Milton had their wishes for unionization tested within the one year period and more than six months had elapsed between the two applications – Certificate issued

EXCEL TECHNOLOGIES LIMITED; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS.. (Mar./Apr.) 353

Bar – Certification – Construction Industry – In this application for certification, the responding party argued that s. 160(3) operated to create a mandatory bar in all construction industry cases (there had been a dismissal under s. 8.1(5)7 of an earlier application) – The Board relied on its prior jurisprudence that found that, following the 2000 amendments to the LRA, construction applications for certification are to be dealt with under ss. 7 to 10 of the Act – The Board held that ss. 158 to 160 supplement those general certification provisions where necessary – This meant that the bar in s. 10(3), not the bar in s. 160(3), applies to applications dismissed under s. 8.1 – The Board rejected the argument that s. 160(3) creates a mandatory bar in all construction industry cases – The Board noted that, even though there are no dismissal provisions in s. 160, s. 160(3) is not meaningless, as every clause in a statute must be given meaning – The Board held that s. 160(3) extends the bar in s. 10(3) to the relevant employee bargaining agency and affiliated bargaining agents in the ICI sector – Matter continues

MONDIALE DEVELOPMENT LTD. AND/OR PINNACLE INTERNATIONAL; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ....(Jul./Aug.) 783

Bar – Certification – Construction Industry – The union filed a card-based certification application on the same day that it advised the Board it wished to withdraw an earlier application, where the Board had found, after hearing status dispute evidence, that a representation vote was required due to membership support being between 40 and 55 percent – The employer requested that the Board impose a discretionary bar pursuant to s. 7(9) – The Board found that the stage of the proceeding when the union seeks leave of the Board to withdraw its application is significant – Here the union chose to withdraw its application after realizing that it did not have sufficient support for certification without a vote – The Board considered this a far different circumstance than when a union withdraws early, after seeing the employer's response and realizing it has insufficient support – The Board found, after the parties' prolonged litigation, that was not fair to the employer, having successfully resisted some of the union's positions, to have to start all over again – The employer and employees were entitled to a period of repose – The Board exercised its discretion and imposed a six month bar – Application dismissed

K.J. BEAMISH CONSTRUCTION CO. LTD.; RE IUOE, LOCAL 793 ....(May/June) 575

Bar – Certification – Construction Industry – The Union filed an earlier application for certification in 2003 in which the Employer had given notice under section 8.1 – The application was "forgotten" after the representation vote and remained unresolved – In 2006, the Union filed a fresh application with respect to the same bargaining unit – Neither party made any reference to the 2003 application in their filings with the Board – After the Board brought the 2003 application to the parties' attention, the Union conceded the section 8.1 objection and requested that the 2003 application be dismissed without imposing a bar to future applications in accordance with subsection 10(4) – The Employer argued that because this was a construction industry application and there was a conflict between sections 160 and 10, section 160 took precedence and the mandatory bar in subsection 160(3) applied – The Board held that there was no conflict and subsection 10(4) applied to preclude the application of the mandatory bar – The Board declined to impose a discretionary bar having regard to the substantial prejudice to the employees' right to seek union representation – The Board found it unnecessary to impose a discretionary bar so as to deter similar circumstances in the future in the future – The 2006 application was allowed to proceed

AMACON CONSTRUCTION LTD. AND/OR AMACON DEVELOPMENT GROUP INC.; RE LIUNA LOCAL 183...(Jan./Feb.) 1

Bar – Certification – Construction Industry – Voluntary Recognition – In an application for certification filed by CUPW, the intervenor, Local 183, claimed that the application was barred because it had a VRA with the responding employer – In reply, CUPW claimed that at the time Local 183 entered into the VRA with the employer there were no employees in the VRA bargaining unit – The Board found that, for the purposes of s. 66, the creation of an employment relationship is critical and is not dependent upon whether work has been performed for the employer as of the date that the VRA was entered into – The Board found that an employment relationship will commence upon the acceptance of a non-conditional employment offer and after the completion of the necessary employment documentation – The Board held that Local 183 and the employer were not required to wait until after the employees had actually commenced work prior to entering into the VRA – There was no reason to set aside the agreement – Matter continues

DISTINCTION SERVICE PLUS INC. ; RE THE CANADIAN UNION OF POSTAL WORKERS (CUPW); RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .... (Sept./Oct.) 855

Bargaining Rights – Abandonment – Construction Industry Grievance – Delay – Labourers 506 grieved that Burling Ranger had violated the provincial ICI agreement by failing to employ members of 506 or failing or refusing to subcontract work to subcontractors in contractual relations with the union – The Labourers relied on a collective agreement signed in 1970 by the applicant and Burling – The responding party argued that the union had abandoned its rights by failing to assert them as long ago as prior to the inception of provincial bargaining – The union served Burling with notice to bargain in the early 1970's, but the employer responded that it had no work in the geographic area – The Board heard evidence relating to subsequent work performed by Burling over an almost thirty-year period, without any assertions by the Labourers to rights under the collective agreement - Grievance dismissed

BURLING RANGER COMPANY INC.; RE LIUNA LOCAL 506 .... (Jan./Feb.) 8

Bargaining Rights – Abandonment – Certification – Construction Industry – Delay – In 1998, Local 183 filed an application for certification for all the construction labourers of the respondent, Beamish – A vote took place and 23 of the 36 votes were challenged but the application was never disposed of – In November 2006 Local 183 brought an application for certification for the same bargaining unit – Beamish took the position that the 1998 application was still outstanding and that the 2006 application indicated Local 183's intention to withdraw the 1998 application – Beamish further argued that the Board should treat the 1998 application as having been withdrawn by Local 183, with a bar subject to subsection 7(10) of the Act – Local 183 offered no explanation for the delay or for why the 1998 application was never concluded – Absent any explanation for the delay, the Board dismissed the 1998 application as being abandoned as of the date of the present decision – The Board declined to characterize the 2006 application as a request to withdraw the 1998 application and thus determined that mandatory bars imposed pursuant to subsections 7(10) and 10(3) were not applicable – The Board did exercise its discretion pursuant to subsection 111(2)(k) and barred Local 183 for six months from the date of this decision from making an application for certification to represent the members of the bargaining unit of Beamish – Both applications (1998 and 2006) dismissed

K.J. BEAMISH CONSTRUCTION SERVICES LTD. RE LIUNA LOCAL 183 .... (Jan./Feb.) 116

Bargaining Rights – Bargaining Unit – Certification – Collective Agreement – Construction Industry – In these six applications for certification, the issues were: (i) whether the Employers were bound by the EPSCA Agreement on the application date; (ii) whether the applications ought to be dismissed for a lack of labour relations purpose and (iii) the appropriate bargaining unit – The Employers were not members of EPSCA – When bidding for work tendered by Ontario Power Generation (OPG), the Employers must accept a "Labour Requirements Clause" (LRC) which obliged the Employers to abide by the EPSCA Agreement – The Board held that the Employers were not bound by the EPSCA Agreement because (a) the Employers had neither entered into voluntary recognition agreements with the Unions nor authorized EPSCA or OPG to be their agent by virtue of the LRC; (b) the LRC did not establish a direct connection between the Employers and the Unions party to the EPSCA Agreement; (c) contacting the Unions' hiring halls for employees did not constitute a voluntary recognition agreement, and (d) section 57 of the *Act* had no application as the Employers were not members of EPSCA – The Board refused the Employers' request to dismiss the applications for certifications as the Board found the *Act* did not confer on it the discretion to dismiss or refuse to entertain timely applications for certification, even if the applications are devoid of labour relations purpose – The Unions' request for a province-wide bargaining unit was rejected; rather, the appropriate bargaining unit was the Unions' trade or craft in all sectors of the construction industry other than the ICI sector in the Board Areas in which employees were working on the application date – Certificates issued in two; the others referred to Manager of Field Services

CANFORM STRUCTURES LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION..(Jan./Feb.) 28

Bargaining Rights – Collective Agreement – Reference – Sale of Business – Voluntary Recognition – Bingo Press was sold to Arrow which was located in Niagara Falls – The union's collective agreement with Bingo Press was limited in geographic scope to St. Catherines – The employer asked the Board to dismiss the union's sale of business application for failing to plead a *prima facie* case – The Board's determination of the motion would decide the Ministerial reference (whether the minister had the authority to appoint a conciliation officer) and accordingly the reference was joined with the sale of business application – The union took the position that its bargaining rights arose from an oral voluntary recognition agreement or from estoppel – The Board found that the bargaining rights and collective agreement transferred to Arrow and the only issue was whether the collective agreement applied to Arrow's operation in Niagara Falls – The Board found that only collective agreements transfer on the sale of business, not oral amendments to scope clauses or oral voluntary recognition agreements – The Board found that the estoppel argument failed for two reasons: first there was no clear promise or representation made by Bingo Press and second, there was no detrimental reliance – Accordingly the union's sale of business application was dismissed for failing to prove a *prima facie* case and the Board's advice to the Minister was that he did not have the authority to appoint a conciliation officer – Application dismissed and advice given

BINGO PRESS & SPECIALTY LIMITED/ARROW GAMES (BAZAAR & NOVELTY); RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS' UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 462..(Mar./Apr.) 307

Bargaining Rights – Construction Industry – Employer Initiation – Termination – The employer was certified in both the ICI and non-ICI sectors of the construction industry – The employer acknowledged that employees may have heard him express his disappointment with the union – Two applications for the termination of bargaining rights were filed by an employee – The first was filed 5 months after the union was certified; the second, exactly 6 months after the union was certified – The union alleged that both applications were influenced by the employer under section 63(16) of the Act – The Board noted, relying on Tenaquip Ltd. that circumstantial evidence may be sufficient to lead to an inference of improper employer involvement – The Board found that the employer influenced the first application for the termination of bargaining rights because the employer: 1) expressed his disappointment with the union to its employees; 2) informed the employees that a decertification application could be filed; 3) signed the petition filed with the first application; and 4) may have even been involved in circulating the petition – The Board also considered the fact that the employees were paid for the time they took to mail the application – The Board further found that the employer influenced the second application for the termination of bargaining rights because the employee could not explain: 1) how the application and the second petition were drafted; 2) how the application was sent to the union and to the Board; and 3) the reason the application was sent so close to the first and untimely application – Applications dismissed

SWING N SCAFF INC.; RE CARON, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93 .... (Nov./Dec.) 1106

Bargaining Rights – Employer Initiation – Practice and Procedure – Termination – The employer argued that the trade union should be precluded from alleging a violation of s. 63(16) because it failed to particularize the impugned conduct in a timely way – The Board upheld the employer's position, stating that the union must engage in due diligence to articulate its position as promptly as possible, in accordance with the Board's Rules – This failure of due diligence (a delay of over three months) caused the Board to deny the union the opportunity to lead evidence relating to employer initiation – Matter continues

WALLS.COM INC.; RE DARREN CATES; RE THE CARPENTER'S DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTER'S AND JOINERS OF AMERICA AND ITS LOCAL 494 AND CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL AND GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL & ALLIED WORKERS AND UNITED BROTHERHOOD OF CARPENTER'S AND JOINTERS OF AMERICA; AND THE FOLLOWING LOCAL UNIONS; 18, 27, 93, 249, 397, 446, 494, 675, 785, 1256, 1669, 1946, 1988, 2041, 2222 AND 2486 .... (Nov./Dec.) 1179

Bargaining Rights – Termination – During the on-going litigation of this non-construction employer application, the Board was asked to consider whether certain construction work undertaken by the School Board as part of a contract for services funded by Human Resources Development Canada operated to exclude the School Board from the definition of a non-construction employer – The Board found that it was possible for an entity such as the School Board to be a construction employer, although its principal business is not in the construction industry – Further, the HRDC, a branch of the federal government to which the *Labour Relations Act, 1995* specifically does not apply, was an unrelated party for purposes of the present analysis – The Board held that (1) the School Board did perform some construction work as part of its contract with HRDC, but the contract was to provide educational services and the building work was merely incidental to the fulfillment of the terms of the contract; (2) the payment the School Board received from HRDC did not, in the Board's view, constitute compensation from an unrelated person for work in the construction industry; (3) consequently, the limited construction work did not preclude the School Board from continuing with its assertion that it was a non-construction employer – Matter continues

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 6; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE IUPAT, LOCAL 1494; RE LIUNA, LOCAL 625 .... (Sept./Oct.) 874

Bargaining Unit – Certification – Conflict of Interest – Employee – The union applied for and was successful in a representation vote for a bargaining unit of security guards in the gaming area of Georgian Downs, a horse racetrack – The employer and the racetrack argued that the bargaining unit could not be appropriate because the guards monitored other employees, some of whom were in a different bargaining unit held by the same union – The Board examined the duties of the guards, their surveillance and security functions, their interaction with other employees, as well as the union's activities, bargaining rights and constitution, and found there would be no conflict or compromise in the guards' employment duties and their union responsibilities – Certification granted, subject to gaming registration

OLG SLOTS AT GEORGIAN DOWNS; RE PUBLIC SERVICE ALLIANCE OF CANADA .... (Mar./Apr.) 397

Bargaining Unit – Certification – Construction Industry – Employee – The Board was asked to determine whether the employees of the responding party in this application for certification were exempt from the Act pursuant to s. 3(c) because the employees were "employed in horticulture" and the "primary business" of the employer is agriculture or horticulture – The responding party was subcontracted by a road construction contractor to perform landscaping work adjacent to the construction of a new roadway – The Board held that spreading topsoil in preparation for the installation of sod and hydro seeding as part of a road building project was horticulture and work in the construction industry – However, an examination of the employer's primary business revealed that a significant majority of its business was either landscaping or operation of a sod farm, and therefore fell within the definition of agriculture or horticulture – Application dismissed

CHRIS TRANBERG & SON LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.......... (Mar./Apr.) 338

Bargaining Unit – *Public Sector Labour Relations Transition Act,* 1997 – Five community care access centres (CCACs) were merged – OPSEU applied to the Board for a determination of the appropriate bargaining agent and bargaining unit(s) – The applicant represents 190 of the affected employees in the single largest predecessor bargaining unit – The applicant asserts that a single "all employee" bargaining unit is appropriate, whereas the employer, CUPE and ONA assert that there should be two bargaining units: one comprised of professional employees and the other of office and clerical employees – The Board noted that both options are consistent with the purpose of s.22(7) of the Act – Finding that either a single unit or a two-unit configuration could comfortably obtain for the newly-configured CCAC, the Board signaled its preference to maintain the *status quo* where there are existing, fully functional collective bargaining relationships – In this case four of five CCACs, or approximately sixty-five per cent of employees, operated under a two bargaining unit system – Two bargaining units ordered (*Editors' note:* Following the counting of the ballots, OPSEU won the office and clerical unit; ONA became the bargaining agent for the professional employees: decision dated May 12, 2007)

HAMILTON NIAGARA HALDIMAND BRANT COMMUNITY CARE ACCESS CENTRE; RE OPSEU; RE HAMILTON COMMUNITY CARE ACCESS CENTRE; RE BRANT COMMUNITY CARE ACCESS CENTRE; RE COMMUNITY CARE ACCESS CENTRE NIAGARA; RE COMMUNITY CARE ACCESS CENTRE OF HALTON; RE HALDIMAND-NORFOLK COMMUNITY CARE ACCESS CENTRE; RE CUPE AND ITS LOCAL 4700; RE ONTARIO NURSES ASSOCIATION..........(May/June) 548

Bargaining Unit – Bar – Certification – Employee – This application for certification was filed within a year of an earlier application against the same employer – Subsequent to the dismissal of the first application the employer moved its operations from Brampton to Milton (which area was not covered by the bargaining unit proposed in the first application) – Ten employees moved from Brampton to Milton and performed the same jobs – The Board found that the word "position" must be interpreted in context to avoid a result that is inconsistent with sound labour relations or the purposes of the Act – The Board found that the position of an employee is not the same unless it is with the same employer and in a geographic location covered by the scope clause of the original application – Therefore the ten employees transferred to Milton were in different positions than they held in Brampton, and they would not have been in the bargaining unit proposed in the current application had they occupied their original position – Given that the criteria set out in s. 10(3.1) had been met, the Board exercised its discretion to consider the current application since only 10 of the 30 employees at Milton had their wishes for unionization tested within the one year period and more than six months had elapsed between the two applications – Certificate issued

EXCEL TECHNOLOGIES LIMITED; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS..........(Mar./Apr.) 353

Bargaining Unit – Bargaining Rights – Certification – Collective Agreement – Construction Industry – In these six applications for certification, the issues were: (i) whether the Employers were bound by the EPSCA Agreement on the application date; (ii) whether the applications ought to be dismissed for a lack of labour relations purpose and (iii) the appropriate bargaining unit – The Employers were not members of EPSCA – When bidding for work tendered by Ontario Power Generation (OPG), the Employers must accept a "Labour Requirements Clause" (LRC) which obliged the Employers to abide by the EPSCA Agreement – The Board held that the Employers were not bound by the EPSCA Agreement because (a) the Employers had neither entered into voluntary recognition agreements with the Unions nor authorized EPSCA or OPG to be their agent by virtue of the LRC; (b) the LRC did not establish a direct connection between the Employers and the Unions party to the EPSCA Agreement; (c) contacting the Unions' hiring halls for employees did not constitute a voluntary recognition agreement, and (d) section 57 of the *Act* had no application as the Employers were not members of EPSCA – The Board refused the Employers' request to dismiss the applications for certifications as the Board found the *Act* did not confer on it the discretion to dismiss or refuse to entertain timely applications for certification, even if the applications are devoid of labour relations purpose – The Unions' request for a province-wide bargaining unit was rejected; rather, the appropriate bargaining unit was the Unions' trade or craft in all sectors of the construction industry other than the ICI sector in the Board Areas in which employees were working on the application date – Certificates issued in two; the others referred to Manager of Field Services

CANFORM STRUCTURES LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION..(Jan./Feb.) 28

Bargaining Unit – Build-Up – Certification – Representation Vote – The union applied to certify a bargaining unit of employees employed at the employer's City of Vaughan site – The employer argued that the appropriate bargaining unit description should include both the City of Vaughan and the City of Brampton since it was about to transfer its remaining employees from the Brampton location to the new Vaughan facility – According to the employer, excluding the remaining Brampton employees would prevent them from having a say in whether they wished to be represented – In the alternative, the employer argued that the Board should hold a second representation vote under the build-up doctrine – The Board found that the consequences of not allowing the Brampton employees to have a say in the representation vote did not justify a departure from the Board's normal practice in limiting the geographic scope of a bargaining unit to one municipality – The Board also found that the size of the build-up only represented 16 percent of the total number of employees who were employed at both locations on the date of the application rather than the 50 percent found to be appropriate in earlier jurisprudence – Therefore, the number of employees employed in the bargaining unit on the date of the application was sufficiently representative of the employees in the ultimate bargaining unit – The bargaining unit applied for was appropriate – Certification granted

CAPITAL TOOL & DESIGN LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ....(Nov./Dec.) 1015

Bargaining Unit – Certification – Construction Industry – Sector Determination – The parties to these various applications for certification sought a determination from the Board for a number of issues relating to bargaining units – In an earlier decision (May 24, 2006), the Board confirmed that the appropriate bargaining unit is the bargaining unit described in the EPSCA collective agreement which bound the parties at the time the applications were filed – The Board assisted the parties in clarifying the work covered in the bargaining unit description – The Board confirmed that the bargaining unit described in the August 22, 2005 decision was limited to the electrical power systems sector, and held that the certificates should make specific reference to that sector – Finally, the Board made determinations respecting the correct names of the responding parties – Separate certificates to issue at a later date

ONTARIO POWER GENERATION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCILS; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE LIUNA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE POWER WORKERS UNION CANADIAN UNION OF PUBLIC EMPLOYEES, C.L.C. LOCAL 1000...............................(Jan./Feb.) 146

Bargaining Unit – Certification – Construction Industry – The union sought to expand its existing bargaining units by displacing itself and applying for certification for broader bargaining units –The broader units included employees who were already subject to collective agreements between the applicant and the responding parties but were not at work on the application date, plus all sectors of the construction industry in the Board Areas where the electricians employed by the responding parties were working on the application date – The applicant asserted that a displacement application was the only way for it to expand its bargaining unit which was necessary to ensure that its members would not be deprived of work by the responding parties' use of subcontractors bound by collective agreements with other trade unions – The Board held that the applicant was in the same position as any trade union seeking to displace another; thus the established policy that the appropriate bargaining unit in a displacement application is the unit held by the incumbent union applied unless there were clear and compelling reasons to hold otherwise – In this case there were no clear and compelling reasons as to why this long standing policy ought to be disregarded – The Board held that the appropriate bargaining unit was the one found in the applicant's collective agreement with each responding party – Matter continues

ONTARIO POWER GENERATION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE LIUNA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE POWER WORKERS UNION CANADIAN UNION OF PUBLIC EMPLOYEES, C.L.C. LOCAL 1000 .... (Jan./Feb.) 137

Bargaining Unit – Certification – Employee – The union sought to certify all registered graduate students employed pursuant to a Graduate Research Assistantship (GRA) – GRAs are a form of funding provided to some graduate students – The employer argued that GRA work had educational value and was no different than thesis work, whereas the union argued that GRA work, not directed to a graduate student's own thesis, provides value to Western and is employment – The Board found that there was no difference between the activities and tasks a graduate student normally undertakes for GRA work and what they do when performing other graduate studies related work – Finally, the Board noted that while graduate students may be employed by Western with respect to the performance of some work, GRA work does not create an employment relationship – Bargaining unit was not appropriate – Matter continues

UNIVERSITY OF WESTERN ONTARIO; RE PUBLIC SERVICE ALLIANCE OF CANADA .... (Nov./Dec.) 1151

Build-Up – Bargaining Unit – Certification – Representation Vote – The union applied to certify a bargaining unit of employees employed at the employer's City of Vaughan site – The employer argued that the appropriate bargaining unit description should include both the City of Vaughan and the City of Brampton since it was about to transfer its remaining employees from the Brampton location to the new Vaughan facility – According to the employer, excluding the remaining Brampton employees would prevent them from having a say in whether they wished to be represented – In the alternative, the employer argued that the Board should hold a second representation vote under the build-up doctrine – The Board found that the consequences of not allowing the Brampton employees to have a say in the representation vote did not justify a departure from the Board's normal practice in limiting the geographic scope of a bargaining unit to one municipality – The Board also found that the size of the build-up only represented 16 percent of the total number of employees who were employed at both locations on the date of the application rather than the 50 percent found to be appropriate in earlier jurisprudence – Therefore, the number of employees employed in the bargaining unit on the date of the application was sufficiently representative of the employees in the ultimate bargaining unit – The bargaining unit applied for was appropriate – Certification granted

CAPITAL TOOL & DESIGN LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ....(Nov./Dec.) 1015

Build-Up – Certification – Termination – Voluntary Recognition Agreement – In an application for certification filed by CUPW, the intervenor, LIUNA Local 183, claimed that the application was barred because it had a VRA with the responding employer – In reply, CUPW requested that the Board declare, pursuant to s. 66 of the Act, that Local 183 was not entitled to represent the employees of the bargaining unit at the time it entered into the VRA with the employer – CUPW further submitted that the Board should apply the principle of "build up" in making its determination under s. 66, as only 41% of the workforce was employed by Distinction at the time it entered into the VRA with Local 183 – The Board held that it could only consider whether Local 183 was entitled to represent the employees in the bargaining unit "at the time the agreement was entered into," and therefore build-up had no application under s. 66 – The Board further held that, in the absence of a finding of improper conduct, it generally does not set aside agreements reached by employers and their incumbent unions – Rather, "the Board preserves the labour relations regime and stability that has been established by the parties [as t]his is consistent with the stated purposes of the Act" – Matter continues

DISTINCTION SERVICE PLUS INC.; RE THE CANADIAN UNION OF POSTAL WORKERS; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183.....(Jul./Aug.) 730

Certification – Constitutional Law – Construction Industry – In the context of an application for certification under the construction industry provisions, the employer, Atomic Energy of Canada Limited (AECL), claimed it was a federal Crown agent and therefore the *Canada Labour Code* and not the Act was applicable – The Board held that the reference to "the Crown" in s. 4 of the Act was sufficiently broad to include federal Crown agents, thus both the Code and the Act could apply – The Board held that there were inconsistencies between the two statutes "in the nature of the body to whom the application must be made… who may issue the certificate [and] the manner in which entitlement to be certified is to be demonstrated, and the consequences that flow from any certification" – The Board then applied the doctrine of paramountcy, holding that, to the extent of these inconsistencies, the federal Code was paramount and would apply, provided that AECL was actually a Crown agent – The Board found that all of the carpenters' work related to refurbishing CANDU reactors and therefore fell within the purposes of the AECL as delegated by statute – The Board concluded that AECL was therefore a Crown agent governed by the Code, therefore paramountcy applied, rendering s. 4 of the Act inoperative for the purposes of certification – Application dismissed

ATOMIC ENERGY OF CANADA LTD.; RE CJA, LOCAL 2222 ....(Jul./Aug.) 703

Certification – Abandonment – Bargaining Rights – Construction Industry – Delay – In 1998, Local 183 filed an application for certification for all the construction labourers of the respondent, Beamish – A vote took place and 23 of the 36 votes were challenged but the application was never disposed of – In November 2006 Local 183 brought an application for certification for the same bargaining unit – Beamish took the position that the 1998 application was still outstanding and that the 2006 application indicated Local 183's intention to withdraw the 1998 application – Beamish further argued that the Board should treat the 1998 application as having been withdrawn by Local 183, with a bar subject to subsection 7(10) of the Act – Local 183 offered no explanation for the delay or for why the 1998 application was never concluded – Absent any explanation for the delay, the Board dismissed the 1998 application as being abandoned as of the date of the present decision – The Board declined to characterize the 2006 application as a request to withdraw the 1998 application and thus determined that mandatory bars imposed pursuant to subsections 7(10) and 10(3) were not applicable – The Board did exercise its discretion pursuant to subsection 111(2)(k) and barred Local 183 for six months from the date of this decision from making an application for certification to represent the members of the bargaining unit of Beamish – Both applications (1998 and 2006) dismissed

K.J. BEAMISH CONSTRUCTION SERVICES LTD.; RE LIUNA LOCAL 183 .... (Jan./Feb.) 116

Certification – Bar – Bargaining Unit – Employee – This application for certification was filed within a year of an earlier application against the same employer – Subsequent to the dismissal of the first application the employer moved its operations from Brampton to Milton (which area was not covered by the bargaining unit proposed in the first application) – Ten employees moved from Brampton to Milton and performed the same jobs – The Board found that the word "position" must be interpreted in context to avoid a result that is inconsistent with sound labour relations or the purposes of the Act – The Board found that the position of an employee is not the same unless it is with the same employer and in a geographic location covered by the scope clause of the original application – Therefore the ten employees transferred to Milton were in different positions than they held in Brampton, and they would not have been in the bargaining unit proposed in the current application had they occupied their original position – Given that the criteria set out in s. 10(3.1) had been met, the Board exercised its discretion to consider the current application since only 10 of the 30 employees at Milton had their wishes for unionization tested within the one year period and more than six months had elapsed between the two applications – Certificate issued

EXCEL TECHNOLOGIES LIMITED; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS .... (Mar./Apr.) 353

Certification – Bar – Construction Industry – In this application for certification, the responding party argued that s. 160(3) operated to create a mandatory bar in all construction industry cases (there had been a dismissal under s. 8.1(5)7 of an earlier application) – The Board relied on its prior jurisprudence that found that, following the 2000 amendments to the LRA, construction applications for certification are to be dealt with under ss. 7 to 10 of the Act – The Board held that ss. 158 to 160 supplement those general certification provisions where necessary – This meant that the bar in s. 10(3), not the bar in s. 160(3), applies to applications dismissed under s. 8.1 – The Board rejected the argument that s. 160(3) creates a mandatory bar in all construction industry cases – The Board noted that, even though there are no dismissal provisions in s. 160, s. 160(3) is not meaningless, as every clause in a statute must be given meaning – The Board held that s. 160(3) extends the bar in s. 10(3) to the relevant employee bargaining agency and affiliated bargaining agents in the ICI sector – Matter continues

MONDIALE DEVELOPMENT LTD. AND/OR PINNACLE INTERNATIONAL; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .... (Jul./Aug.) 783

Certification – Bar – Construction Industry – The union filed a card-based certification application on the same day that it advised the Board it wished to withdraw an earlier application, where the Board had found, after hearing status dispute evidence, that a representation vote was required due to membership support being between 40 and 55 percent – The employer requested that the Board impose a discretionary bar pursuant to s. 7(9) – The Board found that the stage of the proceeding when the union seeks leave of the Board to withdraw its application is significant – Here the union chose to withdraw its application after realizing that it did not have sufficient support for certification without a vote – The Board considered this a far different circumstance than when a union withdraws early, after seeing the employer's response and realizing it has insufficient support – The Board found, after the parties' prolonged litigation, that was not fair to the employer, having successfully resisted some of the union's positions, to have to start all over again – The employer and employees were entitled to a period of repose – The Board exercised its discretion and imposed a six month bar – Application dismissed

K.J. BEAMISH CONSTRUCTION CO. LTD.; RE IUOE, LOCAL 793 ....(May/June) 575

Certification – Bar – Construction Industry – The Union filed an earlier application for certification in 2003 in which the Employer had given notice under section 8.1 – The application was "forgotten" after the representation vote and remained unresolved – In 2006, the Union filed a fresh application with respect to the same bargaining unit – Neither party made any reference to the 2003 application in their filings with the Board – After the Board brought the 2003 application to the parties' attention, the Union conceded the section 8.1 objection and requested that the 2003 application be dismissed without imposing a bar to future applications in accordance with subsection 10(4) – The Employer argued that because this was a construction industry application and there was a conflict between sections 160 and 10, section 160 took precedence and the mandatory bar in subsection 160(3) applied – The Board held that there was no conflict and subsection 10(4) applied to preclude the application of the mandatory bar – The Board declined to impose a discretionary bar having regard to the substantial prejudice to the employees' right to seek union representation – The Board found it unnecessary to impose a discretionary bar so as to deter similar circumstances in the future in the future – The 2006 application was allowed to proceed

AMACON CONSTRUCTION LTD. AND/OR AMACON DEVELOPMENT GROUP INC.; RE LIUNA LOCAL 183...(Jan./Feb.) 1

Certification – Bar – Construction Industry – Voluntary Recognition – In an application for certification filed by CUPW, the intervenor, Local 183, claimed that the application was barred because it had a VRA with the responding employer – In reply, CUPW claimed that at the time Local 183 entered into the VRA with the employer there were no employees in the VRA bargaining unit – The Board found that, for the purposes of s. 66, the creation of an employment relationship is critical and is not dependent upon whether work has been performed for the employer as of the date that the VRA was entered into – The Board found that an employment relationship will commence upon the acceptance of a non-conditional employment offer and after the completion of the necessary employment documentation – The Board held that Local 183 and the employer were not required to wait until after the employees had actually commenced work prior to entering into the VRA – There was no reason to set aside the agreement – Matter continues

DISTINCTION SERVICE PLUS INC. ; RE THE CANADIAN UNION OF POSTAL WORKERS (CUPW); RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .... (Sept./Oct.) 855

Certification – Bargaining Rights – Bargaining Unit – Collective Agreement – Construction Industry – In these six applications for certification, the issues were: (i) whether the Employers were bound by the EPSCA Agreement on the application date; (ii) whether the applications ought to be dismissed for a lack of labour relations purpose and (iii) the appropriate bargaining unit – The Employers were not members of EPSCA – When bidding for work tendered by Ontario Power Generation (OPG), the Employers must accept a "Labour Requirements Clause" (LRC) which obliged the Employers to abide by the EPSCA Agreement – The Board held that the Employers were not bound by the EPSCA Agreement because (a) the Employers had neither entered into voluntary recognition agreements with the Unions nor authorized EPSCA or OPG to be their agent by virtue of the LRC; (b) the LRC did not establish a direct connection between the Employers and the Unions party to the EPSCA Agreement; (c) contacting the Unions' hiring halls for employees did not constitute a voluntary recognition agreement, and (d) section 57 of the *Act* had no application as the Employers were not members of EPSCA – The Board refused the Employers' request to dismiss the applications for certifications as the Board found the *Act* did not confer on it the discretion to dismiss or refuse to entertain timely applications for certification, even if the applications are devoid of labour relations purpose – The Unions' request for a province-wide bargaining unit was rejected; rather, the appropriate bargaining unit was the Unions' trade or craft in all sectors of the construction industry other than the ICI sector in the Board Areas in which employees were working on the application date – Certificates issued in two; the others referred to Manager of Field Services

CANFORM STRUCTURES LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION.. (Jan./Feb.) 28

Certification – Bargaining Unit – Conflict of Interest – Employee – The union applied for and was successful in a representation vote for a bargaining unit of security guards in the gaming area of Georgian Downs, a horse racetrack – The employer and the racetrack argued that the bargaining unit could not be appropriate because the guards monitored other employees, some of whom were in a different bargaining unit held by the same union – The Board examined the duties of the guards, their surveillance and security functions, their interaction with other employees, as well as the union's activities, bargaining rights and constitution, and found there would be no conflict or compromise in the guards' employment duties and their union responsibilities – Certification granted, subject to gaming registration

OLG SLOTS AT GEORGIAN DOWNS; RE PUBLIC SERVICE ALLIANCE OF CANADA.. (Mar./Apr.) 397

Certification – Bargaining Unit – Construction Industry – Employee – The Board was asked to determine whether the employees of the responding party in this application for certification were exempt from the Act pursuant to s. 3(c) because the employees were "employed in horticulture" and the "primary business" of the employer is agriculture or horticulture – The responding party was subcontracted by a road construction contractor to perform landscaping work adjacent to the construction of a new roadway – The Board held that spreading topsoil in preparation for the installation of sod and hydro seeding as part of a road building project was horticulture and work in the construction industry –

However, an examination of the employer's primary business revealed that a significant majority of its business was either landscaping or operation of a sod farm, and therefore fell within the definition of agriculture or horticulture – Application dismissed

CHRIS TRANBERG & SON LTD. ; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..(Mar./Apr.) 338

Certification – Bargaining Unit – Build-Up – Representation Vote – The union applied to certify a bargaining unit of employees employed at the employer's City of Vaughan site – The employer argued that the appropriate bargaining unit description should include both the City of Vaughan and the City of Brampton since it was about to transfer its remaining employees from the Brampton location to the new Vaughan facility – According to the employer, excluding the remaining Brampton employees would prevent them from having a say in whether they wished to be represented – In the alternative, the employer argued that the Board should hold a second representation vote under the build-up doctrine – The Board found that the consequences of not allowing the Brampton employees to have a say in the representation vote did not justify a departure from the Board's normal practice in limiting the geographic scope of a bargaining unit to one municipality – The Board also found that the size of the build-up only represented 16 percent of the total number of employees who were employed at both locations on the date of the application rather than the 50 percent found to be appropriate in earlier jurisprudence – Therefore, the number of employees employed in the bargaining unit on the date of the application was sufficiently representative of the employees in the ultimate bargaining unit – The bargaining unit applied for was appropriate – Certification granted

CAPITAL TOOL & DESIGN LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS)..(Nov./Dec.) 1015

Certification – Bargaining Unit – Construction Industry – Sector Determination – The parties to these various applications for certification sought a determination from the Board for a number of issues relating to bargaining units – In an earlier decision (May 24, 2006), the Board confirmed that the appropriate bargaining unit is the bargaining unit described in the EPSCA collective agreement which bound the parties at the time the applications were filed – The Board assisted the parties in clarifying the work covered in the bargaining unit description – The Board confirmed that the bargaining unit described in the August 22, 2005 decision was limited to the electrical power systems sector, and held that the certificates should make specific reference to that sector – Finally, the Board made determinations respecting the correct names of the responding parties – Separate certificates to issue at a later date

ONTARIO POWER GENERATION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE LIUNA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE POWER WORKERS UNION CANADIAN UNION OF PUBLIC EMPLOYEES, C.L.C. LOCAL 1000..............................(Jan./Feb.) 146

Certification – Bargaining unit – Construction Industry – The union sought to expand its existing bargaining units by displacing itself and applying for certification for broader bargaining units –The broader units included employees who were already subject to collective agreements between the applicant and the responding parties but were not at work on the application date, plus all sectors of the construction industry in the Board Areas where the electricians employed by the responding parties were working on the application date – The applicant asserted that a displacement application was the only way for it to expand its bargaining unit which was necessary to ensure that its members would not be deprived of work by the responding parties' use of subcontractors bound by collective agreements with other trade unions – The Board held that the applicant was in the same position as any trade union seeking to displace another; thus the established policy that the appropriate bargaining unit in a displacement application is the unit held by the incumbent union applied unless there were clear and compelling reasons to hold otherwise – In this case there were no clear and compelling reasons as to why this long standing policy ought to be disregarded – The Board held that the appropriate bargaining unit was the one found in the applicant's collective agreement with each responding party – Matter continues

ONTARIO POWER GENERATION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE LIUNA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE POWER WORKERS UNION CANADIAN UNION OF PUBLIC EMPLOYEES, C.L.C. LOCAL 1000...............................(Jan./Feb.) 137

Certification – Bargaining Unit – Employee – The union sought to certify all registered graduate students employed pursuant to a Graduate Research Assistantship (GRA) – GRAs are a form of funding provided to some graduate students – The employer argued that GRA work had educational value and was no different than thesis work, whereas the union argued that GRA work, not directed to a graduate student's own thesis, provides value to Western and is employment – The Board found that there was no difference between the activities and tasks a graduate student normally undertakes for GRA work and what they do when performing other graduate studies related work – Finally, the Board noted that while graduate students may be employed by Western with respect to the performance of some work, GRA work does not create an employment relationship – Bargaining unit was not appropriate – Matter continues

UNIVERSITY OF WESTERN ONTARIO; RE PUBLIC SERVICE ALLIANCE OF CANADA..(Nov./Dec.) 1151

Certification – Build-Up – Termination – Voluntary Recognition Agreement – In an application for certification filed by CUPW, the intervenor, LIUNA Local 183, claimed that the application was barred because it had a VRA with the responding employer – In reply, CUPW requested that the Board declare, pursuant to s. 66 of the Act, that Local 183 was not entitled to represent the employees of the bargaining unit at the time it entered into the VRA with the employer – CUPW further submitted that the Board should apply the principle of "build up" in making its determination under s. 66, as only 41% of the workforce was employed by Distinction at the time it entered into the VRA with Local 183 – The Board held that it could only consider whether Local 183 was entitled to represent the employees in the bargaining unit "at the time the agreement was entered into," and therefore build-up had no application under s. 66 – The Board further held that, in the absence of a finding of improper conduct, it generally does not set aside agreements reached by employers and their incumbent unions – Rather, "the Board preserves the labour relations regime and stability that has been established by the parties [as t]his is consistent with the stated purposes of the Act" – Matter continues

DISTINCTION SERVICE PLUS INC.; RE THE CANADIAN UNION OF POSTAL WORKERS; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183.....(Jul./Aug.) 730

Certification – Certification where Act Contravened – Construction Industry – Remedies – Representation Vote – Unfair Labour Practice – The union brought an application for certification and remedial certification under s. 11, alleging that the employer had contravened the Act by terminating a union organizer, thereby preventing the union from being able to demonstrate it had more than 40% membership support – The employer, solely owned by Normoyle, had four employees during the relevant time period – McCarthy, the inside union organizer, was terminated nine days after being hired, and the day after Normoyle discovered there was a union organizing drive – The Board did not accept that McCarthy was fired for performance deficiencies, for being slow in his work and for being late – The Board noted that the employer did not warn or reprimand McCarthy for these matters at the time they occurred, nor was he allowed any opportunity to change – The Board found the totality of the performance issues were of no consequence to Normoyle at the time they occurred because he did not act on them – The Board further found that the timing of the termination, one day after Normoyle discovered that McCarthy was involved in the union organizing the work place, was significant in light of the lack of employer-demonstrated reasons for termination – The Board found that McCarthy was fired because he was behind the union organizing drive and this was a breach of the Act – The Board then turned to the appropriate remedy under s. 11 recognizing that it can only certify without a representation vote where "no other remedy would be sufficient to counter the effects of the contravention" – The Board found that the employees could not freely express their wishes in a representation vote in the context of a discharge of an individual associated with union activity – The employer's actions served two purposes: stopping the union organizer from accessing employees and sending a message to employees that support for the union meant job loss – The Board found that a representation vote with ancillary relief would be insufficient to counter this effect – The union's application under s. 11 was granted and the union was certified – Application granted

1443760 ONTARIO INC. OPERATING AS SWING STAGE EQUIPMENT RENTALS OTTAWA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93..........(May/June) 485

Certification – Certification Where Act Contravened – Construction Industry – Unfair Labour Practice – The union sought automatic certification under s. 11 of the Act, alleging that the owners of the respondent company had contravened ss. 70, 72 and 76 – The union alleged that a company owner had phoned and physically threatened the outside union organizer, and a "captive audience" meeting was held during which physical threats against union organizers and threats to job security were made – The Board held that threatening a person who acts on behalf of a union with physical violence was a violation of both ss. 70 and 76 –The Board also held that even though no employee was directly threatened with violence at the meeting, the offer of money by one of the owners to anyone who would punch a union organizer was a suggestion of violence that necessarily has the effect of creating a climate of intimidation – The Board held that that comment was a violation of ss. 70 and 72(c) – The Board held that statements made by the owners at the meeting that the company may lose customers, that the employees would have to drive their own vehicles (rather than company vehicles) at their own expense if they had to work for another employer, and the general statement that there could be job cuts, reductions and lost hours if the union won all constituted threats to job security and amounted to a violation of ss. 70, 72(c) and 76 of the Act – The physical threats and threats to job security created an atmosphere in which employees were unable to express their true wishes "free of the shadow of repercussions by the employer" – Automatic certification granted – Certificate Issued

EAST ELGIN CONCRETE FORMING LIMITED; RE LIUNA, LOCAL 1059 ....(Jul./Aug.) 741

Certification – *Companies' Creditors Agreement Act* – Stay – Two days after the ballots were counted in this application and more than fifty percent were cast in favour of the union, the Ontario Superior Court of Justice issued an order staying all proceedings in respect of the responding party, Dovecorp – The applicant argued that the issuance of the certificate was merely an administrative function reflecting the results reached prior to the stay – The Board held that the breadth of the court order precluded the Board from taking any steps without leave of the court – Application adjourned *sine die*

DOVECORP ENTERPRISES INC.; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION ....(Jul./Aug.) 738

Certification – Conflict of Interest – Security Guards – The employer objected to the certification of a bargaining unit of security guards at its client AA, asserting that a conflict of interest would arise because a local of the applicant holds bargaining rights for two other groups of AA's employees – Although the parties focused their submissions on the extent that the guards monitor AA's employees, the Board found that monitoring made up only a small part of the guards' duties – Even the guards' obligation to search individual employees' vehicles in specific circumstances did not give rise to the conflict of interest contemplated by paragraph 1 of s. 14(5) – Certificate granted

HAWTHORNE SECURITY & COMMUNICATIONS INC.; RE IAM.............(Jan./Feb.) 91

Certification – Construction Industry – BACU filed a series of card-based applications to certify the employees in bargaining units for which it already holds bargaining rights – The union asserted it had the statutory right to seek reconfirmation of its member support – Given that the union demonstrated evidence of greater than 55% support for each unit sought, there was no need for a vote – It appeared to the Board that BACU was pre-empting any possible raids to its incumbent units – Although it expressed its reluctance to sanction BACU's conduct, the Board felt it was inappropriate to engage in a challenge to that conduct – The Board noted that such an application appeared to be an indirect application for termination of a collective agreement, and could possibly be a means of redesigning a bargaining unit without the employer's approval – Nonetheless, the Board determined it must proceed with the applications – Matters continue

GEORGE & ASMUSSEN LIMITED et al; RE BRICK AND ALLIED CRAFT UNION OF CANADA; RE IUBAC LOCAL 6; RE IUBAC LOCAL 7; RE IUBAC LOCAL 20; RE BCM MASONRY RE; VAUGHAN MASONRY; RE TWIN MASONRY INC.; RE BERNEL MASONRY LTD.; SQUIRE MASONRY LTD.; RE VINMOD CONSTRUCTION; RE CANEX MASONRY LTD.; MAC MASONRY INC. ....(May/June) 542

Certification – Construction Industry – An employee alleged that he had been misled into signing a membership card contrary to s. 128.1(5) of the LRA – The Board stated that in considering allegations of this nature, it is important to distinguish between an employee's change of heart about joining a union, and a genuine subsequent realization that the consequences of the employee's signing a card were substantially different from what had been represented to him/her – In this case, the Board found that no misrepresentation had been made to the employee and that he simply had had second thoughts about joining the union – In coming to this conclusion, the Board noted that the employee: had presented two contradictory explanations that were unreasonable; had

signed the membership card which was simple and straightforward; had provided a considerable amount of personal information on the membership card that was inconsistent with his explanation for signing the card; and had familiarity with being a member of a union from a previous place of work – Accordingly, the Board gave no weight to the submissions made by the employee and declined to order a hearing to receive evidence from him about the allegations he made – Certificate granted

SILVER CONCRETE PUMPING LIMITED; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793.. (Sept./Oct.) 943

Certification – Construction Industry – BACU filed a card-based application to certify the employees in a bargaining unit for which it already holds bargaining rights – When asked by the Board to explain its motivation, the applicant submitted that it need not provide any justification other than to assert it was exercising its statutory rights – Notwithstanding the Board's concerns that a grant of the application would place the applicant in the exact position it occupied when it made the application (as would a dismissal of the application), and despite the fact that granting the certificate would allow the applicant to unilaterally obtain early termination of its existing collective agreement, and in the absence of any opposition from either the responding party or the intervenors, the Board could find nothing in the Act to explicitly preclude the application for certification – In the absence of any opposition to the application, the matter is allowed to proceed – Matter referred to Regional Certification Meeting

STEFCON CONSTRUCTION INC.; RE BRICK AND ALLIED CRAFT UNION OF CANADA; RE IUBAC LOCAL 6; RE IUBAC LOCAL 7; RE IUBAC LOCAL 20..(May/June) 645

Certification – Construction Industry – Employee – Membership Evidence – Practice and Procedure – Reconsideration – In a request for reconsideration of a successful certification application where the employer had provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis – The handwriting expert determined that it was highly probable that the person who signed the affidavit had also earlier signed the membership evidence – The responding party submitted that the employee in question admitted that the signature on the membership card was his – Request for reconsideration withdrawn

LES BURCH & SON CONTRACTING ; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL... (Mar./Apr.) 396

Certification – Construction Industry – Employee – Practice and Procedure – Status – The employer sought to remove two names from its list of employees at the Regional Certification meeting for one of two proffered reasons: either because they were performing work of a different craft or they were independent contractors – The Board refused to allow the employer to alter its list – The prejudice to the union in having to attempt to ascertain what work the employees were doing on an ordinary day two months earlier was significant and perhaps impossible to overcome – Secondly, the facts pleaded by the employer to establish independent contractor status were equivocal and therefore also prejudicial – Motion dismissed – Matter continues

MELANDI DRYWALL SYSTEM INC.; RE IUPAT, LOCAL 1891...............(Nov./Dec.) 1075

Certification – Construction Industry – Employer – Practice and Procedure – Related Employer – Timeliness – The Board found nothing wrong with the application naming three possible employers as responding parties: the applicant specifically referenced subsection 1(4) and asked that the certificate name all three entities – The responding party filed its response five days late but asked the Board to exercise its discretion to accept the late-filed information in accordance with the ruling of the Divisional Court in *Maystar* (see [2007] OLRB Rep. March/April 459) – The Board examined possible criteria for the exercise of discretion: the nature of certification applications and the need for speed in their determination; the reasons for the late filing; prejudice to the applicant – The Board finds that prejudice is present in every case, and will be the same in every case – In the circumstances of this case, the Board does not exercise its discretion to accept the late-filed information – The applicant delivered its materials to three fax machines for the three employers; personal delivery is not a requirement of the Act or the Board's Rules – Time extension allowed for response to related employer allegations – Matter continues

REIDS UPTOWN HOMES, REIDCO NORTH LTD., S.R. PROPERTIES INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL ....(May/June) 633

Certification – Construction Industry – Employer – The Board had to determine the identity of the employer in this application for certification – Wallworks obtained a contract to install fabric wall panels - ACTT bid on the installation of the panels at the behest of Wallworks, but was not awarded the contract because the work had to be performed by a union sub-contractor – Wallworks retained the services of Fabric Interior, who hired T, the president of ACTT to train and supervise the work – T invoiced Fabric on an hourly basis for his time, and for the ACTT equipment used on the project – T contacted the hiring hall and supervised the employees for the duration of the project – Employee cheques were paid by Fabric, and ROEs were issued by Wallworks - The Board found, applying the criteria from *York Condominium*, that the fundamental control over the employees was held by ACTT, so it was their employer – Certification granted

ACTT INSTALLATION LTD. ; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93 .... (Mar./Apr.) 300

Certification – Construction Industry – Evidence – Judicial Review – Natural Justice – Practice and Procedure – Reconsideration – The Carpenters moved to set aside the decision of a single judge of Divisional Court permitting the employer to rely on an affidavit in support of its judicial review application of the Board's certification decision (see [2006] OLRB Rep. September/October 756) – A full panel of the Divisional Court held that the motions judge was not "clearly wrong" in concluding that one paragraph of the affidavit ought to be received by the reviewing panel in support of the employer's allegation that it was denied natural justice by the Board – The balance of the affidavit, however, should be struck because it contains material not before the Board and it is clear the Board's decision was rendered on the basis of evidence before it – The "new evidence" foundation for judicial review cannot succeed – Motion allowed in part

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND ONTARIO LABOUR RELATIONS BOARD ....(Jan./Feb.) 249

Certification – Construction Industry – Intervenor – A number of trade unions and employer bargaining agencies sought to intervene as *amicus curiae* in this certification application, arguing they wanted to present the Board with views regarding the undesirability of having the applicant trade union succeed and the potential destabilization in the construction industry should the applicant be found to be a trade union (its status has not yet been established) – The Board rejected the intervention of those seeking *amicus curiae* standing, relying on its own significant knowledge and experience in construction – When the Formwork Council challenged some of the voluntary recognition agreements relied on by the applicant, the applicant was invited to respond to the challenge – The Carpenters alleged the respondent employer was related to companies they were pursuing in another Board application – Application for certification joined with other Carpenter applications – Matter continues

PBS GENERAL CONTRACTORS INC.; RE CANADIAN CONSTRUCTION WORKERS' UNION; RE DRYWALL ACOUSTIC LATHING AND INSULATION, LOCAL 675; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE TABRCO MANAGEMENT LTD.; RE TARGET DRYWALL & ACOUSTICS LTD. ....(Jan./Feb.) 158

Certification – Construction Industry – Judicial Review – The Board certified the Painters' union in this card-based application when the employer failed to file a response in a timely fashion pursuant to s. 128.1(3) – In its request for reconsideration of the Board's decision certifying the union, the responding party relied on the fact that it had delivered its response to the union in a timely manner but, through inadvertence, had failed to file the response with the Board – Relying on *Air-Kool*, the Board held that it had no discretion to extend the time to accept the response – On judicial review, the court held the Board to a standard of correctness and found the Board had erred in interpreting s. 128.1(3) as a limit on its ability to accept a late filing – The word "shall" in the provision was a directory imperative, but aimed only at the employer, not the Board – Application for judicial review granted

MAYSTAR GENERAL CONTRACTORS INC.; RE IUPAT, LOCAL 1819; RE ONTARIO LABOUR RELATIONS BOARD .... (Mar./Apr.) 459

Certification – Construction Industry – Membership Evidence – *Prima facie* motion – Practice and Procedure – Representation Vote – Unfair Labour Practice – The Company alleged that when employees signed membership cards they were confused and/or misled and did not realize what they were signing nor what the membership cards would be used for – First, the Board found that the allegations, even if true, do not breach s. 5 (the section cannot be violated); s. 15 (no particulars of employer domination); s. 70 (a union is not a "person" and was not acting as an "employer", hence it cannot violate the provision); or s. 76 (there was no "intimidation or coercion") – Accordingly, the Board dismissed the s. 96 complaint – Second, the Board found that these circumstances could give rise to the exercise of the Board's discretion to order a vote under s. 128.1(13)(b), even where the Union has more than 55% membership evidence, and accordingly, it dismissed the union's *prima facie* motion on this issue – Finally the Board refused to order disclosure of employee statements since the statements were covered by litigation privilege (collection of information by Company's counsel concerning what employees were doing on the date of application), and the balancing of competing interests also led to that conclusion – That is, since the information recorded in the statements would be given little, if any, weight (they were collected three to five weeks after the date of application), the potential undermining of the adversarial litigation process (by ordering the disclosure) outweighed any potential value that these statements had – Unfair Labour Practice complaint dismissed – Certification application continues

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486......................(Nov./Dec.) 1079

Certification – Construction Industry – Non-Construction Employer – The Labourers filed two applications for certification simultaneously (industrial and construction), seeking to represent the employees of ReNu engaged in the dismantling and removal of metal fixtures at a moribund steel manufacturing facility – The Board found that the predominant nature of the work the employees were performing was "demolition" and therefore construction – Secondly, the Board examined whether ReNu could qualify for the non-construction employer exemption – The Board found that ReNu was not performing construction work for which it could expect compensation from a third party; rather, ReNu was salvaging the metal and reselling it as part of the salvage operations – Application for construction certification dismissed – Non-Construction employer status granted – Application for industrial certification referred to Manager of Field Services to count ballots

RENU RECYCLING INC.; RE LIUNA LOCAL 837. ....(Jan./Feb.) 177

Certification – Construction Industry – Practice and Procedure – The responding party delivered its response to the union in a timely way, but failed to file a timely response with the Board since it had not realized that its facsimile report read "Busy, no response" and was not received by the Board – The Board followed the Divisional Court's decision in *Maystar* and decided to exercise its discretion to allow the late filing on three grounds: the union consented; the union was not prejudiced since they had received the response in a timely way; and when the respondent was informed of the problem they immediately filed their response – Matter continues

GAGNON DEMOLITION INC.; RE LIUNA, LOCAL 625............................ (Mar./Apr.) 358

Certification – Construction Industry – Practice and Procedure – Timeliness – The Board finds that in a card-based application for certification, there is no prejudice to the union if the responding party fails to provide the response to the union at the same time it files it with the Board – The response was delivered to the applicant one week after it was due – The Board relieves against the late delivery of the response – Matter continues

LEMMO MASONRY INC.; RE LIUNA LOCAL 527......................................(May/June) 584

Certification – Construction Industry – Practice and Procedure – Status – Timeliness – The respondent employer sought to add an employee to the bargaining unit two weeks after the application for certification was first filed – The Board held that the Divisional Court's ruling in *Maystar* [2007] OLRB Rep. March/April 459 regarding the Board's discretion to consider late evidence filed by a responding party applies to these circumstances – The Board noted that the ability of a trade union to determine what tasks an employee performed on the date of application "diminishes by the hour," but that prejudice to the union as a result of late filing of information will not result in every case – The Board held that the two-week delay in notifying the Board coupled with a failure to notify the union earlier would result in prejudice to the union if the employee was included on the list – The Board rejected the argument that the employer could act as a proxy for the employee holding that there was an adequate process for the employee to assert his right to participate – The Board also held that it is not for the employer to raise the rights and interests of an employee, particularly where the employee himself has not sought to assert that he is an employee in the bargaining unit – The Board denied the request of the respondent to add the employee to the list – Matter continues

STRUCT-CON CONSTRUCTION LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL .... (Jul./Aug.) 810

Certification – Construction Industry – Practice and Procedure – Representation Vote – Unfair Labour Practice – LIUNA filed membership evidence in excess of 55% in support of this card-based application for certification – The responding party alleged that the union had acted improperly in its collection of membership evidence by assuring the employees they were only signing cards to get a vote and by advising the employees that the employer was supportive of the union – Further, a number of employees wrote to the Board stating that they did not wish to belong to the union, and requesting a representation vote – The Board ruled that the fact an employee signed a membership card but later had a change of heart would be irrelevant to the exercise of its discretion in certifying the union – The Board was concerned, however, about the employer's allegations and considered its options: to certify the union, to order a vote, or to dismiss the application – The Board determined that it should set the matter down for hearing to hear evidence about the allegations attributed to the union's organizers - Matter listed for hearing

HILLSIDE SOD LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .... (Nov./Dec.) 1037

Certification – Construction Industry – Practice and Procedure – Where the responding party makes specific allegations about improper statements having been made by the applicant's representatives during the collection of membership evidence, the Board's Rules require that the applicant be advised of the dates, places and times the alleged statements were made, but the disclosure of the names of the people to whom the alleged statements were made was not required to be produced – Application continues

HILLSIDE SOD LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .... (Nov./Dec.) 1040

Certification – Construction Industry – Practice and Procedure – In a card-based certification application the employer responded over two weeks late, giving as a reason that the owner's first language was not English and that he did not understand the documents – The Board exercised its discretion to permit the employer's late filed information concerning one issue (whether two persons were independent contractors), but refused to grant it with respect to the other (whether the employer may add someone to the list) – On the first issue the Board found the delay would not significantly prejudice the union since the information—nature of the relationship—was not time sensitive; whereas the latter point, whether someone was at work on the day of application, would cause significant prejudice to the union given the company's delay – Matter continues

VICTOR CHADI o/a VICTOR HUGO DRYWALL; RE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA .... (Nov./Dec.) 1168

Certification – Construction Industry – Reconsideration – Trade Union Status – The Carpenters sought reconsideration of a Board decision granting the Sheet Metal Workers trade union status (unreported Board decision, June 20, 2007) in eight certification applications – The Carpenters argued that the Board denied them procedural fairness by not allowing them to adduce evidence relating to an earlier finding of status involving different employees and employers – The Board held that it acted properly in refusing the Carpenters the

opportunity to lead evidence on the earlier files: first, the Board assumed all of the material facts and particulars pled concerning the earlier applications to be true; secondly, the parties in those matters were not before the Board; and finally, the Sheet Metal Workers had agreed not to rely on those earlier cases, but to establish its trade union status *de novo* – The Board further held that if the Carpenters wished to pursue their allegations of impropriety relating to the earlier files, there were processes available to them for doing so under the Act; the Board specifically did not rule on what effect or consequences any findings of fault in those unfair labour practices might have on the eight certification applications – Matter continues

EASTERN EAVESTROUGHING LTD.; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51; RE CARPENTERS & ALLIED WORKERS LOCAL 27, CJA..(Jul./Aug.) 758

Certification – Construction Industry – Reconsideration – Unfair Labour Practice – The Board was asked to reconsider its dismissal of a certification application; the dismissal was based on the Board's finding that a particular individual was performing bargaining unit work on the application date and was therefore included in the unit, reducing the applicant's requisite support for card-based certification; in a vote, conducted earlier on agreement of the parties, the union had lost – At the reconsideration hearing, the applicant adduced credible evidence that the impugned employee's time card had been altered to show he performed bargaining unit work and not office work, and the applicant only learned of the tampering after the dismissal of the application for certification – The Board found the employer violated s. 70 of the Act –Reconsideration granted, dismissal revoked, certificate issued

KOOL FAB MECHANICAL INC.; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION...(Jul./Aug.) 774

Certification – Construction Industry – Remedies – Unfair Labour Practice – In this request for remedial certification the Board found: First, that the second-in-command asking employees if they had signed cards was intimidatory – Second, that the owner's statements without consequences, actual or intended, do not become unlawful statements simply because an employee overhears them in circumstances where it was not reasonable to expect that employee to overhear them – However, the owner's attempt to conduct surveillance on a meeting being held after hours (and off employer or customer property) for the purposes of discovering who might be interested in the union was improper and was a violation of s. 70 – Third, that a lay-off due to a temporary downturn in work was not tainted by any anti-union animus – This conclusion was supported by the fact that the employee did not actively demonstrate support for the union, and he was not involved in trying to recruit others; further, the employer offered him his job back two weeks later – Fourth, that the lay-off of the union's key inside organizer was in fact a discharge in violation of s. 72 – The Board held that while the employer did contravene the Act, these violations and the termination of the inside organizer, were not so serious that the Board could conclude that section 11 was the only appropriate remedy – Therefore, the Board ordered compensation to the inside organizer and a posting – ULP Application allowed, in part; Certification dismissed

L & L PAINTING AND DECORATING LTD.; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL UNION 557.....................(Sept./Oct.) 887

Certification – Construction Industry – Representation Vote – Unfair Labour Practice – Remedies – The union filed an application for card-based certification as well as an unfair labour practice complaint alleging violations of ss. 70, 72 and 76 of the Act – Because the Board had earlier determined that 40 to 55 percent of the employees in the bargaining unit were members of the union on the date that the application for certification was filed, the Board directed that a representation vote be held and counted forthwith (The union had asked the vote to be deferred until after the ULP was determined) – The Board held that if the union does not obtain 50 percent of the votes cast in the representation vote, s. 11(2) of the Act is still applicable and the unfair labour practice complaint will be heard – Matter continues

DOUBLE H CONCRETE FORMING; RE LIUNA, LOCAL 1059 ....(Nov./Dec.) 1030

Certification – Construction Industry – Status – Trade Union – The Board provided reasons for granting the Canadian Construction Workers' Union trade union status in the construction industry – After the Board rejected (in other previous decisions) the requests from various trade unions to intervene in the certification application, only the Painters and Carpenters were left to challenge the CCWU – The CCWU had altered its bargaining unit description to include only construction labourers working in the residential sector in Board Area 8 – The evidence established that the work being performed by the employees was concrete chipping and clean-up – The objections raised by the Painters and Carpenters were dismissed because their dispute was of a jurisdictional nature, rather than a challenge to bargaining rights for their particular crafts – The Board found that the CCWU had taken all necessary steps to establish itself as a trade union, and that it provided adequate evidence to meet the threshold that would identify it as a trade union pertaining to the construction industry – Certificate granted

PBS GENERAL CONTRACTORS INC.; RE CANADIAN CONSTRUCTION WORKERS' UNION..(Mar./Apr.) 412

Certification – Construction Industry – Unfair Labour Practice – The employer alleged in post-vote representations that the union had engaged in misconduct that affected the employees' expression of their true wishes – The Board found that: (1) an employee's statement that the union "took care of" him was ambiguous; (2) the provision of travel expenses, overnight accommodation and unlimited food and drinks to the employees by the union to secure the employees' votes did not amount to intimidation or coercion; (3) the union's offers of premium employment to one of the employees was not improper; (4) a threat to cause an employee's discharge was a type of economic intimidation – Matter set down for hearing to hear *viva voce* evidence on the final allegation

VANSMIT LTD. O/A JAY-DEE CONCRETE FORMING; RE LIUNA, LOCAL 625 ....(Nov./Dec.) 1164

Certification – Employee – Status – The Board examined the position of "inventory clerk" or "auditor" for purposes of certification of a clerical unit of the employer's employees – The parties had earlier agreed to alter the recognition clause of the employer's production unit because the auditors were supervisors within the meaning of the bargaining unit description – In the current application the union sought to have the auditors excluded either because they were supervisors or because they performed managerial functions within the meaning of s. 1(3) of the Act – The Board held that since the parties had agreed the auditors exercised supervisory functions so as to be excluded from the production unit, and there was no material change in their status prior to the instant application, they remained supervisors within the meaning of the clerical bargaining unit – Status determined

PENSKE LOGISTICS; RE TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 880 ....(May/June) 617

Certification – Membership Evidence – Practice and Procedure – Reconsideration – In the context of a reconsideration of a certification application where the employer provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis – As the request for reconsideration was proceeding to hearing, the union sought the Board's permission to disclose to the employer the identity of the person whose signature was challenged – Disclosure granted – Matter continues

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL...(Jan./Feb.) 125

Certification – Practice and Procedure – A dispute arose with respect to the status of certain individuals in this certification application – The parties had refused to sign the Certification Worksheet following the Regional Certification meeting - The Board outlined the importance of recording parties' agreement at various points in the certification process, and its expectation that parties will affix their signatures to the worksheet in recognition of their confirmed positions – The absence of a signature on the worksheet will not preserve a unilateral right to later change or add to a position – Submissions directed

PACE ENTERPRISES (1998) INC.; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS DRYWALL AND ALLIED WORKERS UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA......... (Mar./Apr.) 410

Certification – Practice and Procedure – Related Employer – Remedies – Unfair Labour Practice – The Labourers filed an application to represent the employees of Postma, seeking remedial certification as well as a declaration that Postma and Specific are a single employer – As a further remedy for Postma's alleged unfair labour practice (one of Postma's owners had advocated a preference for CLAC over the Labourers in the days prior to the representation vote), the Labourers asked the Board to terminate CLAC's bargaining rights with Specific – The Board held that the revocation of a union's bargaining rights is an extreme remedy, to be invoked only in the most serious cases of wrongdoing – In the instant case, the Labourers were asking the Board to revoke CLAC's bargaining rights in the absence of any suggestion of wrongdoing by CLAC; CLAC was the innocent beneficiary of wrongdoing committed by Postma – The Board made a preliminary determination that it would not order the termination of CLAC's bargaining rights with Specific – Matter continues

1614818 ONTARIO INC c.o.b. POSTMA CONCRETE FORMING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 53 AFFILIATED WITH CHRISTIAN LABOUR ASSOCIATION OF CANADA .... (Mar./Apr.) 297

Certification – Practice and Procedure – Representation Vote – An application for certification was filed on August 22, 2006 – On March 15, 2007, the trade union accepted the employer's s. 8.1 challenge and, on the same date, filed a second application for certification – The employer argued that the second application should be barred pursuant to s. 111(3)(c) of the Act, s. 7(10) of the Act, or s. 111(2)(k) of the Act – In the alternative, the employer argued that the union should be precluded from challenging the inclusion of certain employees that had been included in the first application for certification and which had been agreed to on March 15, 2007 – The Board addressed each of the employer's arguments: (1) there is no basis to depart from the Board's usual practice of postponing consideration of a subsequent application until a final decision has been issued on the original application; (2) s. 7(10) does not apply since the application was not withdrawn; rather, the union accepted the employer's s. 8.1 objection, requiring the Board to dismiss the application under s. 8.1(5)7; and (3) the Board will generally only impose a bar when there have been successive unsuccessful applications or where the wishes of the employees have not been decisively tested in a representation vote – There had been no decisive testing or successive applications and the Board declined to exercise its discretion to dismiss the second application for certification – Finally, the Board held that voter eligibility must be determined on the date of the application for certification – Neither party is bound to lists of eligible voters by virtue of positions previously taken in a different application – First application dismissed – Second application continues

WILLIAM DAY CONSTRUCTION LIMITED RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 ....(Nov./Dec.) 1183

Certification – Practice and Procedure – Unfair Labour Practice – CLAC applied to certify the employees of the employer pursuant to s. 128.1 – Six days later the Labourers intervened in the CLAC application, filed a certification application under s. 8, as well as an unfair labour practice against CLAC and the employer – The Board found there was nothing objectionable in CLAC filing a certification that was in part a displacement and in part a fresh application for a group of unrepresented employees – Secondly, since CLAC was unaware of the Labourers' bargaining rights in the ICI sector, the Board held CLAC was not obliged to identify the other union in its application – The Board then considered s. 111(3) of the Act and the factors relevant to its exercise of discretion in applying that section, including: the ability to ascertain the true wishes of the employees; whether there are overlapping bargaining units; the potential complexities of the vote arrangements; the significance of the application date in the construction industry; the desire to avoid protracted litigation; the timing of the second application; the promotion of harmonious labour relations; and the existence of the outstanding unfair labour practice complaint – The Board found that since the Labourers filed their intervention in the CLAC application on the same day as their own certification (and the intervention was found to be timely by a different panel of the Board), and since no significant steps had been taken in the card-based certification at that point, it would exercise its discretion to treat the applications as having been filed on the same day – Matter continues

CONCRETE SYSTEMS INC.; RE CONSTRUCTION WORKERS LOCAL 53, AFFILIATED WITH CHRISTIAN LABOUR ASSOCIATION OF CANADA; RE LIUNA, LOCAL 1089..(Jul./Aug.) 722

Certification – Remedies – Representation Vote – Unfair Labour Practice – The union filed membership evidence on behalf of fewer than 40% of the bargaining unit, seeking remedial certification under s. 11 based on its accompanying unfair labour application – The employer's s. 8.1 notice was conceded to be relevant – The union requested that a vote be held, and the Board found that since a representation vote was one of the possible outcomes under s. 11, it would be preferable to hold the vote as close to the application date as possible – Also there was no need to seal the ballot box since it would not affect the outcome of the notice under s. 8.1 and the results of the vote would be a relevant consideration for the Board in granting relief under section 11 – Representation Vote ordered; matter continues

792844 ONTARIO INC. O/A SECORD CONSTRUCTION LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..(Jul./Aug.) 701

Certification where Act Contravened – Certification – Construction Industry – Remedies – Representation Vote – Unfair Labour Practice – The union brought an application for certification and remedial certification under s. 11, alleging that the employer had contravened the Act by terminating a union organizer, thereby preventing the union from being able to demonstrate it had more than 40% membership support – The employer, solely owned by Normoyle, had four employees during the relevant time period – McCarthy, the inside union organizer, was terminated nine days after being hired, and the day after Normoyle discovered there was a union organizing drive – The Board did not accept that McCarthy was fired for performance deficiencies, for being slow in his work and for being late – The Board noted that the employer did not warn or reprimand McCarthy for these matters at the time they occurred, nor was he allowed any opportunity to change – The Board found the totality of the performance issues were of no consequence to Normoyle at the time they occurred because he did not act on them – The Board further found that the timing of the termination, one day after Normoyle discovered that McCarthy was involved in the union organizing the work place, was significant in light of the lack of employer-demonstrated reasons for termination – The Board found that McCarthy was fired because he was behind the union organizing drive and this was a breach of the Act – The Board then turned to the appropriate remedy under s. 11 recognizing that it can only certify without a representation vote where "no other remedy would be sufficient to counter the effects of the contravention" – The Board found that the employees could not freely express their wishes in a representation vote in the context of a discharge of an individual associated with union activity – The employer's actions served two purposes: stopping the union organizer from accessing employees and sending a message to employees that support for the union meant job loss – The Board found that a representation vote with ancillary relief would be insufficient to counter this effect – The union's application under s. 11 was granted and the union was certified – Application granted

1443760 ONTARIO INC. OPERATING AS SWING STAGE EQUIPMENT RENTALS OTTAWA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93..(May/June) 485

Certification Where Act Contravened – Certification – Construction Industry – Unfair Labour Practice – The union sought automatic certification under s. 11 of the Act, alleging that the owners of the respondent company had contravened ss. 70, 72 and 76 – The union alleged that a company owner had phoned and physically threatened the outside union organizer, and a "captive audience" meeting was held during which physical threats against union organizers and threats to job security were made – The Board held that threatening a person who acts on behalf of a union with physical violence was a violation of both ss. 70 and 76 –The Board also held that even though no employee was directly threatened with violence at the meeting, the offer of money by one of the owners to anyone who would punch a union organizer was a suggestion of violence that necessarily has the effect of creating a climate of intimidation – The Board held that that comment was a violation of ss. 70 and 72(c) – The Board held that statements made by the owners at the meeting that the company may lose customers, that the employees would have to drive their own vehicles (rather than company vehicles) at their own expense if they had to work for another employer, and the general statement that there could be job cuts, reductions and lost hours if the union won all constituted threats to job security and amounted to a violation of ss. 70, 72(c) and 76 of the Act – The physical threats and threats to job security created an atmosphere in which employees were unable to express their true wishes "free of the shadow of repercussions by the employer" – Automatic certification granted – Certificate Issued

EAST ELGIN CONCRETE FORMING LIMITED; RE LIUNA, LOCAL 1059 ....(Jul./Aug.) 741

Collective Agreement – Bargaining Rights – Bargaining Unit – Certification – Construction Industry – In these six applications for certification, the issues were: (i) whether the Employers were bound by the EPSCA Agreement on the application date; (ii) whether the applications ought to be dismissed for a lack of labour relations purpose and (iii) the appropriate bargaining unit – The Employers were not members of EPSCA – When bidding for work tendered by Ontario Power Generation (OPG), the Employers must accept a "Labour Requirements Clause" (LRC) which obliged the Employers to abide by the EPSCA Agreement – The Board held that the Employers were not bound by the EPSCA Agreement because (a) the Employers had neither entered into voluntary recognition agreements with the Unions nor authorized EPSCA or OPG to be their agent by virtue of the LRC; (b) the LRC did not establish a direct connection between the Employers and the Unions party to the EPSCA Agreement; (c) contacting the Unions' hiring halls for employees did not constitute a voluntary recognition agreement, and (d) section 57 of the *Act* had no application as the Employers were not members of EPSCA – The Board refused the Employers' request to dismiss the applications for certifications as the Board found the *Act* did not confer on it the discretion to dismiss or refuse to entertain timely applications for certification, even if the applications are devoid of labour relations purpose – The Unions' request for a province-wide bargaining unit was rejected; rather, the appropriate bargaining unit was the Unions' trade or craft in all sectors of the construction industry other than the ICI sector in the Board Areas in which employees were working on the application date – Certificates issued in two; the others referred to Manager of Field Services

CANFORM STRUCTURES LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION..(Jan./Feb.) 28

Collective Agreement – Bargaining Rights – Reference – Sale of Business – Voluntary Recognition – Bingo Press was sold to Arrow which was located in Niagara Falls – The union's collective agreement with Bingo Press was limited in geographic scope to St. Catherines – The employer asked the Board to dismiss the union's sale of business application for failing to plead a *prima facie* case – The Board's determination of the motion would decide the Ministerial reference (whether the minister had the authority to appoint a conciliation officer) and accordingly the reference was joined with the sale of business application – The union took the position that its bargaining rights arose from an oral voluntary recognition agreement or from estoppel – The Board found that the bargaining rights and collective agreement transferred to Arrow and the only issue was whether the collective agreement applied to Arrow's operation in Niagara Falls – The Board found that only collective agreements transfer on the sale of business, not oral amendments to scope clauses or oral voluntary recognition agreements – The Board found that the estoppel argument failed for two reasons: first there was no clear promise or representation made by Bingo Press and second, there was no detrimental reliance – Accordingly the union's sale of business application was dismissed for failing to prove a *prima facie* case and the Board's advice to the Minister was that he did not have the authority to appoint a conciliation officer – Application dismissed and advice given

BINGO PRESS & SPECIALTY LIMITED/ARROW GAMES (BAZAAR & NOVELTY); RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS' UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 462 .... (Mar./Apr.) 307

Collective Agreement – Duty of Fair Representation – Trade Union – The six applicants, members of the respondent trade union, CHCW, had filed lay off grievances that were scheduled for arbitration – During a displacement campaign by OPSEU, the members were advised that their grievances would be withdrawn should the members vote for OPSEU – OPSEU was successful and, prior to OPSEU providing a letter to CHCW that OPSEU would act as agent and incur all costs for the grievances, CHCW withdrew the grievances – The Board first found that CHCW's campaign statement--that it would withdraw the grievances--was not a breach of s. 76, since its actions were a reasonable interpretation of its obligations on the loss of representation rights – The Board also found that CHCW's withdrawal of the grievances, prior to hearing from OPSEU, did not breach s. 74 since nothing required a defeated incumbent union to "keep alive" outstanding grievances against the possibility that the incoming union might seek its permission to act as agent with proper cost protection – Accordingly the Board found, in the absence of any obligation by OPSEU to request agency for carriage of the grievances or any reasonable expectation that it would do so, that the withdrawal of the grievances accorded with CHCW's institutional interests and were not a breach of the Act – Finally, once CHCW received OPSEU's letter, the Board found CHCW's failure to take any action to retract its withdrawal could not be a breach of its duty since it could no longer unilaterally accomplish this – Application dismissed

CORPORATION OF THE COUNTY OF GREY OPERATING AS GREY GABLES COUNTY HOME FOR THE AGED, THE; RE PEARL LONG ET AL; RE CANADIAN HEALTH CARE WORKERS UNION .... (May/June) 530

Collective Bargaining – Construction Industry – Duty to Bargain in Good Faith – Intervenors – Parties – Unfair Labour Practice – Three of five constituent member associations of PEBAL filed a complaint alleging the LEBA together with the other two constituent members of PEBAL breached s. 17 of the Act – The applicants allege that LEBA and the two other constituent members, by entering into agreements extending the scope of their appendices and subcontracting provisions, have forced a recognition issue to impasse, since PEBAL cannot adopt an agreement entered into by some members that has a direct negative impact on its other members – The Board found that just as there is no duty to bargain in good faith owed to employees, there is no duty owed to the constituent members of PEBAL – The Board further noted that while it is charged with determining the applications or complaints that are filed with it, the Board must be satisfied the applicants do not just have an interest in the matter, but have the legal right to proceed with the complaint – Here the Board found since there is no duty on LEBA to bargain in good faith with the constituent members of PEBAL, the applicants do not have the legal right to assert that LEBA violated the duty to bargain in good faith owed to PEBAL – Finally the Board characterized this matter as one of a complaint about the manner in which two of the five constituent members of PEBAL have dealt with the other three members (and how LEBA has taken advantage of this schism), and not as one encompassed by s. 17 of the Act – Application dismissed

ONTARIO MASONRY CONTRACTORS ASSOCIATION; RE CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF ONTARIO; RE SEALANT AND WATERPROOFING ASSOCIATION; RE INDUSTRIAL CONTRACTORS ASSOCIATION OF CANADA; RE CONCRETE FLOOR CONTRACTORS ASSOCIATION OF ONTARIO........(May/June) 600

Collective Bargaining – Construction Industry – Interference with employers' organization – Intervenors – Parties – Unfair Labour Practice – Three of five constituent member associations of PEBAL filed a complaint alleging the LEBA together with the other two constituent members of PEBAL interfered in the administration of the employers' organization contrary to s. 71 of the Act – The Board ruled on four preliminary motions raised by the responding parties – First, the Board found that the members of the employers' organization had a direct legal interest in having their organization operate without interference by a trade union and accordingly had standing – Second, the Board declined to determine whether the applicants had pled a *prima facie* case and dismissed the responding parties' motion to dismiss – Third the Board declined to exercise its discretion to refuse to entertain the complaint – Finally, the Board found merit in the responding parties' submissions seeking to defer the matter pending the outcome of an Industrial Inquiry Commission, given that through its mandate the Commission would provide a much better forum for discussing the parties' differences – Adjourned pending release of Commission's report

ONTARIO MASONRY CONTRACTORS ASSOCIATION; RE CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF ONTARIO; RE SEALANT AND WATERPROOFING ASSOCIATION; RE INDUSTRIAL CONTRACTORS ASSOCIATION OF CANADA; RE CONCRETE FLOOR CONTRACTORS ASSOCIATION OF ONTARIO........(May/June) 607

Colleges Collective Bargaining Act – Employee – Status – OPSEU asked the Board to determine whether four continuing education instructors were employees under the CCBA and, if so, whether they fall within the academic bargaining unit – St. Lawrence brought a motion seeking to have the Board defer the issue to arbitration – The Board held that its powers under s. 81 of CCBA were similar to the jurisdiction it enjoyed regarding employee status disputes under s. 114(2) of the LRA – The parties agreed, and the Board accepted, that arbitrators had the authority to make the same determinations – The Board was not satisfied that there was any overriding public policy or remedial opportunity that made it more appropriate than arbitration for a determination of the issue – Application dismissed

ST. LAWRENCE COLLEGE; RE OPSEU........(Sept./Oct.) 951

Companies' Creditors Agreement Act – Certification – Stay – Two days after the ballots were counted in this application and more than fifty percent were cast in favour of the union, the Ontario Superior Court of Justice issued an order staying all proceedings in respect of the responding party, Dovecorp – The applicant argued that the issuance of the certificate was merely an administrative function reflecting the results reached prior to the stay – The Board held that the breadth of the court order precluded the Board from taking any steps without leave of the court – Application adjourned *sine die*

DOVECORP ENTERPRISES INC.; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION........(Jul./Aug.) 738

Conciliation – Reference – The Minister of Labour asked the Board to consider whether he had the authority to appoint a conciliation officer pursuant to section 18 of the Act – With respect to the parties' relationship in one specific Board area, the parties agreed that notice to bargain had been given and there was no subsisting collective agreement between them, so the Board confirmed that the Minister had the authority to appoint a conciliation officer for the parties' dispute in that Board area – With regard to the EPSCA bargaining unit, there was agreement between the parties that the Minister had the authority to appoint a conciliation officer, but they did not agree on the existence of a current collective agreement – The Labourers argued that they had given notice to bargain on more than one occasion after the IESO was established following the 1999 dissolution of Ontario Hydro – The Board held that the communication between the parties in 2003 did not constitute "bargaining" that would have prevented automatic renewal of the existing collective agreement – A letter from a mediator confirming his acceptance of an appointment to mediate cannot be construed as a written notice from one party to the other of its desire to terminate, revise or modify a collective agreement – Similarly, the filing of an application with the Board seeking recognition of bargaining rights and a declaration regarding the applicant's rights does not amount to written notice to the other party of a desire to bargain a renewal agreement – The Board found that the only valid notice to bargain was issued in September 2006, and it would only operate to prevent the renewal of the collective agreement set to expire on April 30, 2008 – The Board rejected the Labourers' contention that the agreement ceased to operate as a matter of law because the responding party refused to recognize the union's bargaining rights – Minister has authority to appoint conciliation officer

INDEPENDENT ELECTRICITY SYSTEM OPERATOR; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA, LOCAL 1059............... (Mar./Apr.) 370

Conflict of Interest – Bargaining Unit – Certification – Employee – The union applied for and was successful in a representation vote for a bargaining unit of security guards in the gaming area of Georgian Downs, a horse racetrack – The employer and the racetrack argued that the bargaining unit could not be appropriate because the guards monitored other employees, some of whom were in a different bargaining unit held by the same union – The Board examined the duties of the guards, their surveillance and security functions, their interaction with other employees, as well as the union's activities, bargaining rights and constitution, and found there would be no conflict or compromise in the guards' employment duties and their union responsibilities – Certification granted, subject to gaming registration

OLG SLOTS AT GEORGIAN DOWNS; RE PUBLIC SERVICE ALLIANCE OF CANADA.. (Mar./Apr.) 397

Conflict of Interest – Certification – Security Guards – The employer objected to the certification of a bargaining unit of security guards at its client AA, asserting that a conflict of interest would arise because a local of the applicant holds bargaining rights for two other groups of AA's employees – Although the parties focused their submissions on the extent that the guards monitor AA's employees, the Board found that monitoring made up only a small part of the guards' duties – Even the guards' obligation to search individual employees' vehicles in specific circumstances did not give rise to the conflict of interest contemplated by paragraph 1 of s. 14(5) – Certificate granted

HAWTHORNE SECURITY & COMMUNICATIONS INC.; RE IAM.............(Jan./Feb.) 91

Conflict of Interest – Judicial Review – Trusteeship – In the ongoing dispute involving LIUNA, Local 183 and two of its pre-trusteeship executives, the Board was asked to rule on the conflict of interest of counsel for the two former executives because of his firm's access to or knowledge of confidential information relating to Local 183 – The Board held there was no conflict because the firm possessed no knowledge outside of what it had learned from its clients to support the litigation, and there had been no change in positions or movement of any lawyers from one side of the litigation to the other - On judicial review, on a standard of correctness, the Divisional Court quashed the Board decision, stating that the prejudice to Local 183 must be "approached on an objective basis of perception by a reasonably informed member of the public, as well as within the context of the continuing importance of the duty of client loyalty and confidence of all parties and the public in the administration of justice" – In the Court's view, all the information held by the law firm related to the trusteeship and its litigation – Although no lawyers had changed sides in the dispute, Local 183's stance shifted from opposition to LIUNA to a position allied in interest with the parent – Citing the Supreme Court of Canada in *MacDonald Estate*, the Court held that a "lawyer who has relevant confidential information cannot act against his client or former client" – Application for judicial review allowed

RICHARD WEISS AS TRUSTEE FOR LOCAL 183; RE ONTARIO LABOUR RELATIONS BOARD; RE ANTONIO DIONISIO AND JOHN DIAS .... (Mar./Apr.) 466

Consent to Prosecute – Contempt – Order for Productions – Practice and Procedure – Related Employer – Sale of a Business – In the context of a s. 69/1(4) application, the Board issued a Confidentiality Order pertaining to documents produced by the responding parties – The responding parties subsequently alleged that the union breached the Confidentiality Order – The union argued the Board had no jurisdiction to consider such a breach – Dealing only with jurisdiction, the Board found that the issue of the breach and enforcement of Orders is one of mixed fact and law and, as such, falls within its jurisdiction – The Board noted that a part of its practice and procedure includes the power to compel the production of documents and to grant Orders protecting the confidentiality of such documents – The Board further noted that if it could not make determinations regarding a possible breach of a Confidentiality Order, such orders would be rendered meaningless – The Board rejected the union's contention that the responding parties had not provided sufficient particulars of their allegations, and that the Board's consideration of the issue would result in undue delay and a waste of the Board's time – The Board found that the fact that it may state a case to the Divisional Court for contempt or may grant a consent to prosecute merely confirms the Board's jurisdiction to consider the issue – Matter continues

KIMBERLY-CLARK CORPORATION AND KIMBERLY-CLARK INC.; NEENAH PAPER, INC. AND NEENAH PAPER COMPANY OF CANADA; BUCHANAN FOREST PRODUCTS LTD., TERRACE BAY PULP INC. AND EAGLE LOGGING INC.; RE UNITED STEELWORKERS LOCAL 1-2693....................................(Jul./Aug.) 765

Constitutional Law – Certification – Construction Industry – In the context of an application for certification under the construction industry provisions, the employer, Atomic Energy of Canada Limited (AECL), claimed it was a federal Crown agent and therefore the *Canada Labour Code* and not the Act was applicable – The Board held that the reference to "the Crown" in s. 4 of the Act was sufficiently broad to include federal Crown agents, thus both the Code and the Act could apply – The Board held that there were inconsistencies between the two statutes "in the nature of the body to whom the application must be made… who may issue the certificate [and] the manner in which entitlement to be certified is to be demonstrated, and the consequences that flow from any certification" – The Board then applied the doctrine of paramountcy, holding that, to the extent of these inconsistencies, the federal Code was paramount and would apply, provided that AECL was actually a Crown agent – The Board found that all of the carpenters' work related to refurbishing CANDU reactors and therefore fell within the purposes of the AECL as delegated by statute – The Board concluded that AECL was therefore a Crown agent governed by the Code, therefore paramountcy applied, rendering s. 4 of the Act inoperative for the purposes of certification – Application dismissed

ATOMIC ENERGY OF CANADA LTD.; RE CJA, LOCAL 2222 ....(Jul./Aug.) 703

Constitutional Law – Interim Relief – Intervenor – Judicial Review – Reference – Unfair Labour Practice – On a ministerial reference regarding the appointment of a conciliator, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – On judicial review, the Divisional Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the appellant had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the Court held that the Board had the statutory authority to conduct the proceedings as it did – The application for judicial review was dismissed – On appeal, the Court of Appeal noted that – (1) there was still no evidence of an aboriginal practice, custom or tradition that supports the right to enact a distinct Code – (2) such a practice would not be integral to the distinctive culture of the appellant – (3) there was no reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim – The decisions of the Board and Divisional Court were correct – Considering the Crown's duty to consult and accommodate the aboriginal claim, the Court found that meaningful consultation could not have taken place because the appellant had not made known its claim during the unionization drive and certification proceedings – The Court also found that the appellant, rather than the Crown, had taken peremptory and unilateral action which initiated the dispute – The Crown did not breach its duty to consult and accommodate – Appeal dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB ....(Nov./Dec.) 1197

Construction Industry – Certification – BACU filed a series of card-based applications to certify the employees in bargaining units for which it already holds bargaining rights – The union asserted it had the statutory right to seek reconfirmation of its member support – Given that the union demonstrated evidence of greater than 55% support for each unit sought, there was no need for a vote – It appeared to the Board that BACU was pre-empting any possible raids to its incumbent units – Although it expressed its reluctance to sanction BACU's conduct, the Board felt it was inappropriate to engage in a challenge to that conduct – The Board noted that such an application appeared to be an indirect application for termination of a collective agreement, and could possibly be a means of redesigning a bargaining unit without the employer's approval – Nonetheless, the Board determined it must proceed with the applications – Matters continue

GEORGE & ASMUSSEN LIMITED et al; RE BRICK AND ALLIED CRAFT UNION OF CANADA; RE IUBAC LOCAL 6; RE IUBAC LOCAL 7; RE IUBAC LOCAL 20; RE BCM MASONRY RE; VAUGHAN MASONRY; RE TWIN MASONRY INC.; RE BERNEL MASONRY LTD.; SQUIRE MASONRY LTD.; RE VINMOD CONSTRUCTION; RE CANEX MASONRY LTD.; MAC MASONRY INC. ....(May/June) 542

Construction Industry – Practice and Procedure – Termination – Timeliness – The application was received by the Board on May 4, 2007, having been delivered to a courier on May 2, 2007 – The Board held that as a rule an application is filed on the day the Board actually receives it, the only exception occurring in the construction industry where certifications and terminations given to Priority Courier will be deemed to have been filed on the date they were given to the courier (Rule 24.2) – The applicant in the present case gave his application to a different courier – The Board was not prepared to extend the exception beyond the one contemplated in the Rules – Application dismissed

YORKWOOD HOMES; RE MARK JONES; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183..(May/June) 667

Construction Industry – *Prima Facie* Motion – Related Employer – The Carpenters were certified to represent carpenters employed by Titan; LIUNA, voluntarily recognized by Paramount, represented construction employees performing concrete formwork – The Carpenters sought a declaration that Paramount and Titan were related – LIUNA brought a motion to dismiss the application for failing to make out a *prima facie* case – The Board held that there was nothing to prevent LIUNA from acquiring bargaining rights with Paramount, notwithstanding that the Carpenters could have earlier claimed similar bargaining rights through a s. 1(4) application – *Prima facie* motion dismissed – Matter continues

TITAN CONTRACTING; RE GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS AND ALLIED TRADES UNITED BROTHERHOOD OF CARPENTERS, LOCAL 494; RE PARAMOUNT HOMES INC.; RE PORTOFINO CORPORATION; RE LIUNA, LOCAL 625 ....(Nov./Dec.) 1140

Construction Industry – Abandonment – Bargaining Rights – Certification – Delay – In 1998, Local 183 filed an application for certification for all the construction labourers of the respondent, Beamish – A vote took place and 23 of the 36 votes were challenged but the application was never disposed of – In November 2006 Local 183 brought an application for certification for the same bargaining unit – Beamish took the position that the 1998 application was still outstanding and that the 2006 application indicated Local 183's intention to withdraw the 1998 application – Beamish further argued that the Board should treat the 1998 application as having been withdrawn by Local 183, with a bar subject to subsection 7(10) of the Act – Local 183 offered no explanation for the delay or for why the 1998 application was never concluded – Absent any explanation for the delay, the Board dismissed the 1998 application as being abandoned as of the date of the present decision – The Board declined to characterize the 2006 application as a request to withdraw the 1998 application and thus determined that mandatory bars imposed pursuant to subsections 7(10) and 10(3) were not applicable – The Board did exercise its discretion pursuant to subsection 111(2)(k) and barred Local 183 for six months from the date of this decision from making an application for certification to represent the members of the bargaining unit of Beamish – Both applications (1998 and 2006) dismissed

K.J. BEAMISH CONSTRUCTION SERVICES LTD. RE LIUNA LOCAL 183 ....(Jan./Feb.) 116

Construction Industry – Accreditation – Intervenor – Standing – In this application for accreditation for all employers of employees engaged in concrete forming construction, the parties to the Carpenters' ICI collective agreement, which also engage in concrete forming construction, sought status as intervenors – The Board found that the intervenors could not be legally affected by the accreditation proceeding since the accreditation order is limited to the employers with whom the responding party has a collective agreement relationship; and where an employer is bound by both the intervenors' ICI agreement and the applicants' and respondents' agreement an accreditation order would neither detract from the bargaining rights held by the intervenors, nor expand the bargaining rights of the responding party – The Board also found nothing special or unique about this accreditation proceeding that would warrant the Board's exercise of its discretion to grant intervention by parties without a legal interest in the matter – Standing denied – Applicants' motion granted

THE ONTARIO FORMWORK ASSOCIATION; RE THE FORMWORK COUNCIL OF ONTARIO; RE CARPENTERS EMPLOYER BARGAINING AGENCY; RE CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA.......................................(Nov./Dec.) 1125

Construction Industry – Alteration of Jurisdiction – Judicial Review – Natural Justice – Practice and Procedure – The Local alleged that the Board's decision, finding just cause for the International to assume jurisdiction of the Local over a computer centre construction project in Barrie, should be quashed on a number of grounds – The Board, noting that s. 147(5) operated to stay the assumption of the Local's jurisdiction, was concerned that a full hearing might render the result inconsequential and moot, sine the project was near completion held a two day consultation in accordance with Rule 41, as the situation required a speedy resolution – The Board, having acknowledged that there were facts in dispute, determined there was sufficient uncontested material to permit it to reach an appropriate decision – The Board fashioned a specific remedy placing restrictions and conditions on the International's transfer of jurisdiction – On judicial review, the court first found that Rule 41 was not *ultra vires*, since there was no improper delegation of authority by the Chair, nor was the rule inconsistent with the scheme of the Act – The court found that the rule sets a standard that must be met before a Vice Chair may exercise their discretion in the circumstances of a particular case, and that the Rule is entirely consistent while noting that the Board "operates in a complex, dynamic, and highly fluid environment where expeditious rulings and informal and accessible procedures are often essential to maintaining the delicate balance between the parties' various interests" – Second, the court found that the Board did not deny the Local natural justice by proceeding with a consultation rather than a full hearing, since the core value embraced by the *audi alteram partem* maxim was met by the Board: providing the parties with an opportunity to be heard – The court also found it was not patently unreasonable for the Board to have chosen this procedure, since the Board was given the authority to balance the need for complete natural justice on the one hand against expedition on the other – Third, the court found that the Board did not exceed its jurisdiction by making findings of fact in the absence of any evidence, since there was evidence before it, the sufficiency and weight of which were within its exclusive jurisdiction, permitting it to make its decision – Fourth, the court found that the Board did not deny natural justice by failing to provide adequate reasons, since it provided a sufficiently adequate explanation of the process it engaged in, the conclusions it reached, on what it founded those conclusions and the results of its conclusions – Finally the court found that the Board's decision on the merits was not patently unreasonable: it was a sound and sensible decision in circumstances of acrimony that permitted the appropriate labour relations objective to be achieved, with the least intrusion on the rights of the Local's members – Application dismissed

IBEW, LOCAL 1739; RE GUILD ELECTRIC LIMITED; RE OLRB ....(May/June) 669

Construction Industry – Alteration of Jurisdiction – Trade Union – Trusteeship – After a local union withdrew from various programs of its parent union and took steps to affiliate itself with a rival union, the parent revoked the local's charter – The local claimed that the revocation violated sections 147 and 149 of the *Act* – The Board held that section 149 had no application as the parent did not attempt to retain any of the legal or institutional attributes of the local – A parent union is entitled to sever its relationship with a local, subject only to the just cause requirement of section 147 – The Board is not likely to weigh the merits of the parent's decision as long as it severs the relationship completely and does not do so for a coercive or punitive motive – The revocation of the charter would harm viable and stable collective bargaining and cause serious labour relations problems because (i) no collective agreement would apply to the geographical area under the local's jurisdiction and (ii) it would unravel a previous order made by the Board that prevented the irreconcilable differences between the parties from disrupting the entire construction industry and inflicting significant damage to the economic interests of both employers and members of the union – The parent would not be able to demonstrate just cause for the revocation of the charter unless it simultaneously took steps to transfer the rights, privileges and duties of the local to the employee bargaining agency – The Board found that the parent acted without just cause and declared the attempted revocation to be null and void

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 25...(Jan./Feb.) 101

Construction Industry – Bar – Certification – In this application for certification, the responding party argued that s. 160(3) operated to create a mandatory bar in all construction industry cases (there had been a dismissal under s. 8.1(5)7 of an earlier application) – The Board relied on its prior jurisprudence that found that, following the 2000 amendments to the LRA, construction applications for certification are to be dealt with under ss. 7 to 10 of the Act – The Board held that ss. 158 to 160 supplement those general certification provisions where necessary – This meant that the bar in s. 10(3), not the bar in s. 160(3), applies to applications dismissed under s. 8.1 – The Board rejected the argument that s. 160(3) creates a mandatory bar in all construction industry cases – The Board noted that, even though there are no dismissal provisions in s. 160, s. 160(3) is not meaningless, as every clause in a statute must be given meaning – The Board held that s. 160(3) extends the bar in s. 10(3) to the relevant employee bargaining agency and affiliated bargaining agents in the ICI sector – Matter continues

MONDIALE DEVELOPMENT LTD. AND/OR PINNACLE INTERNATIONAL; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ....(Jul./Aug.) 783

Construction Industry – Bar – Certification – The union filed a card-based certification application on the same day that it advised the Board it wished to withdraw an earlier application, where the Board had found, after hearing status dispute evidence, that a representation vote was required due to membership support being between 40 and 55 percent – The employer requested that the Board impose a discretionary bar pursuant to

s. 7(9) – The Board found that the stage of the proceeding when the union seeks leave of the Board to withdraw its application is significant – Here the union chose to withdraw its application after realizing that it did not have sufficient support for certification without a vote – The Board considered this a far different circumstance than when a union withdraws early, after seeing the employer's response and realizing it has insufficient support – The Board found, after the parties' prolonged litigation, that was not fair to the employer, having successfully resisted some of the union's positions, to have to start all over again – The employer and employees were entitled to a period of repose – The Board exercised its discretion and imposed a six month bar – Application dismissed

K.J. BEAMISH CONSTRUCTION CO. LTD.; RE IUOE, LOCAL 793 ....(May/June) 575

Construction Industry – Bar – Certification – The Union filed an earlier application for certification in 2003 in which the Employer had given notice under section 8.1 – The application was "forgotten" after the representation vote and remained unresolved – In 2006, the Union filed a fresh application with respect to the same bargaining unit – Neither party made any reference to the 2003 application in their filings with the Board – After the Board brought the 2003 application to the parties' attention, the Union conceded the section 8.1 objection and requested that the 2003 application be dismissed without imposing a bar to future applications in accordance with subsection 10(4) – The Employer argued that because this was a construction industry application and there was a conflict between sections 160 and 10, section 160 took precedence and the mandatory bar in subsection 160(3) applied – The Board held that there was no conflict and subsection 10(4) applied to preclude the application of the mandatory bar – The Board declined to impose a discretionary bar having regard to the substantial prejudice to the employees' right to seek union representation – The Board found it unnecessary to impose a discretionary bar so as to deter similar circumstances in the future in the future – The 2006 application was allowed to proceed

AMACON CONSTRUCTION LTD. AND/OR AMACON DEVELOPMENT GROUP INC.; RE LIUNA LOCAL 183..(Jan./Feb.) 1

Construction Industry – Bar – Certification – Voluntary Recognition – In an application for certification filed by CUPW, the intervenor, Local 183, claimed that the application was barred because it had a VRA with the responding employer – In reply, CUPW claimed that at the time Local 183 entered into the VRA with the employer there were no employees in the VRA bargaining unit – The Board found that, for the purposes of s. 66, the creation of an employment relationship is critical and is not dependent upon whether work has been performed for the employer as of the date that the VRA was entered into – The Board found that an employment relationship will commence upon the acceptance of a non-conditional employment offer and after the completion of the necessary employment documentation – The Board held that Local 183 and the employer were not required to wait until after the employees had actually commenced work prior to entering into the VRA – There was no reason to set aside the agreement – Matter continues

DISTINCTION SERVICE PLUS INC. ; RE THE CANADIAN UNION OF POSTAL WORKERS (CUPW); RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ....(Sept./Oct.) 855

Construction Industry – Bargaining Rights – Bargaining Unit – Certification – Collective Agreement – In these six applications for certification, the issues were: (i) whether the Employers were bound by the EPSCA Agreement on the application date; (ii) whether the applications ought to be dismissed for a lack of labour relations purpose and (iii) the appropriate bargaining unit – The Employers were not members of EPSCA – When bidding for work tendered by Ontario Power Generation (OPG), the Employers must accept a "Labour Requirements Clause" (LRC) which obliged the Employers to abide by the EPSCA Agreement – The Board held that the Employers were not bound by the EPSCA Agreement because (a) the Employers had neither entered into voluntary recognition agreements with the Unions nor authorized EPSCA or OPG to be their agent by virtue of the LRC; (b) the LRC did not establish a direct connection between the Employers and the Unions party to the EPSCA Agreement; (c) contacting the Unions' hiring halls for employees did not constitute a voluntary recognition agreement, and (d) section 57 of the *Act* had no application as the Employers were not members of EPSCA – The Board refused the Employers' request to dismiss the applications for certifications as the Board found the *Act* did not confer on it the discretion to dismiss or refuse to entertain timely applications for certification, even if the applications are devoid of labour relations purpose – The Unions' request for a province-wide bargaining unit was rejected; rather, the appropriate bargaining unit was the Unions' trade or craft in all sectors of the construction industry other than the ICI sector in the Board Areas in which employees were working on the application date – Certificates issued in two; the others referred to Manager of Field Services

CANFORM STRUCTURES LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION..(Jan./Feb.) 28

Construction Industry – Bargaining Rights – Employer Initiation – Termination – The employer was certified in both the ICI and non-ICI sectors of the construction industry – The employer acknowledged that employees may have heard him express his disappointment with the union – Two applications for the termination of bargaining rights were filed by an employee – The first was filed 5 months after the union was certified; the second, exactly 6 months after the union was certified – The union alleged that both applications were influenced by the employer under section 63(16) of the Act – The Board noted, relying on Tenaquip Ltd. that circumstantial evidence may be sufficient to lead to an inference of improper employer involvement – The Board found that the employer influenced the first application for the termination of bargaining rights because the employer: 1) expressed his disappointment with the union to its employees; 2) informed the employees that a decertification application could be filed; 3) signed the petition filed with the first application; and 4) may have even been involved in circulating the petition – The Board also considered the fact that the employees were paid for the time they took to mail the application – The Board further found that the employer influenced the second application for the termination of bargaining rights because the employee could not explain: 1) how the application and the second petition were drafted; 2) how the application was sent to the union and to the Board; and 3) the reason the application was sent so close to the first and untimely application – Applications dismissed

SWING N SCAFF INC.; RE CARON, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93..(Nov./Dec.) 1106

Construction Industry – Bargaining Unit – Certification – Employee – The Board was asked to determine whether the employees of the responding party in this application for certification were exempt from the Act pursuant to s. 3(c) because the employees were "employed in horticulture" and the "primary business" of the employer is agriculture or horticulture – The responding party was subcontracted by a road construction contractor to perform landscaping work adjacent to the construction of a new roadway – The Board held that spreading topsoil in preparation for the installation of sod and hydro seeding as part of a road building project was horticulture and work in the construction industry – However, an examination of the employer's primary business revealed that a significant majority of its business was either landscaping or operation of a sod farm, and therefore fell within the definition of agriculture or horticulture – Application dismissed

CHRIS TRANBERG & SON LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.. (Mar./Apr.) 338

Construction Industry – Bargaining Unit – Certification – Sector Determination – The parties to these various applications for certification sought a determination from the Board for a number of issues relating to bargaining units – In an earlier decision (May 24, 2006), the Board confirmed that the appropriate bargaining unit is the bargaining unit described in the EPSCA collective agreement which bound the parties at the time the applications were filed – The Board assisted the parties in clarifying the work covered in the bargaining unit description – The Board confirmed that the bargaining unit described in the August 22, 2005 decision was limited to the electrical power systems sector, and held that the certificates should make specific reference to that sector – Finally, the Board made determinations respecting the correct names of the responding parties – Separate certificates to issue at a later date

ONTARIO POWER GENERATION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE LIUNA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE POWER WORKERS UNION CANADIAN UNION OF PUBLIC EMPLOYEES, C.L.C. LOCAL 1000................................(Jan./Feb.) 146

Construction Industry – Bargaining Unit – Certification – The union sought to expand its existing bargaining units by displacing itself and applying for certification for broader bargaining units –The broader units included employees who were already subject to collective agreements between the applicant and the responding parties but were not at work on the application date, plus all sectors of the construction industry in the Board Areas where the electricians employed by the responding parties were working on the application date – The applicant asserted that a displacement application was the only way for it to expand its bargaining unit which was necessary to ensure that its members would not be deprived of work by the responding parties' use of subcontractors bound by collective agreements with other trade unions – The Board held that the applicant was in the same position as any trade union seeking to displace another; thus the established policy that the appropriate bargaining unit in a displacement application is the unit held by the incumbent union applied unless there were clear and compelling reasons to hold otherwise – In this case there were no clear and compelling reasons as to why this long standing policy ought to be disregarded – The Board held that the appropriate bargaining unit was the one found in the applicant's collective agreement with each responding party – Matter continues

ONTARIO POWER GENERATION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCILS; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE LIUNA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE POWER WORKERS UNION CANADIAN UNION OF PUBLIC EMPLOYEES, C.L.C. LOCAL 1000................................(Jan./Feb.) 137

Construction Industry – Certification – Constitutional Law – In the context of an application for certification under the construction industry provisions, the employer, Atomic Energy of Canada Limited (AECL), claimed it was a federal Crown agent and therefore the *Canada Labour Code* and not the Act was applicable – The Board held that the reference to "the Crown" in s. 4 of the Act was sufficiently broad to include federal Crown agents, thus both the Code and the Act could apply – The Board held that there were inconsistencies between the two statutes "in the nature of the body to whom the application must be made… who may issue the certificate [and] the manner in which entitlement to be certified is to be demonstrated, and the consequences that flow from any certification" – The Board then applied the doctrine of paramountcy, holding that, to the extent of these inconsistencies, the federal Code was paramount and would apply, provided that AECL was actually a Crown agent – The Board found that all of the carpenters' work related to refurbishing CANDU reactors and therefore fell within the purposes of the AECL as delegated by statute – The Board concluded that AECL was therefore a Crown agent governed by the Code, therefore paramountcy applied, rendering s. 4 of the Act inoperative for the purposes of certification – Application dismissed

ATOMIC ENERGY OF CANADA LTD.; RE CJA, LOCAL 2222 ....(Jul./Aug.) 703

Construction Industry – Certification – An employee alleged that he had been misled into signing a membership card contrary to s. 128.1(5) of the LRA – The Board stated that in considering allegations of this nature, it is important to distinguish between an employee's change of heart about joining a union, and a genuine subsequent realization that the consequences of the employee's signing a card were substantially different from what had been represented to him/her – In this case, the Board found that no misrepresentation had been made to the employee and that he simply had had second thoughts about joining the union – In coming to this conclusion, the Board noted that the employee: had presented two contradictory explanations that were unreasonable; had signed the membership card which was simple and straightforward; had provided a considerable amount of personal information on the membership card that was inconsistent with his explanation for signing the card; and had familiarity with being a member of a union from a previous place of work – Accordingly, the Board gave no weight to the submissions made by the employee and declined to order a hearing to receive evidence from him about the allegations he made – Certificate granted

SILVER CONCRETE PUMPING LIMITED; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793.. (Sept./Oct.) 943

Construction Industry – Certification – BACU filed a card-based application to certify the employees in a bargaining unit for which it already holds bargaining rights – When asked by the Board to explain its motivation, the applicant submitted that it need not provide any justification other than to assert it was exercising its statutory rights – Notwithstanding the Board's concerns that a grant of the application would place the applicant in the exact position it occupied when it made the application (as would a dismissal of the application), and despite the fact that granting the certificate would allow the applicant to unilaterally obtain early termination of its existing collective agreement, and in the absence of any opposition from either the responding party or the intervenors, the Board could find nothing in the Act to explicitly preclude the application for certification – In the absence of any opposition to the application, the matter is allowed to proceed – Matter referred to Regional Certification Meeting

STEFCON CONSTRUCTION INC.; RE BRICK AND ALLIED CRAFT UNION OF CANADA; RE IUBAC LOCAL 6; RE IUBAC LOCAL 7; RE IUBAC LOCAL 20..........(May/June) 645

Construction Industry – Certification – Certification where Act Contravened – Remedies – Representation Vote – Unfair Labour Practice – The union brought an application for certification and remedial certification under s. 11, alleging that the employer had contravened the Act by terminating a union organizer, thereby preventing the union from being able to demonstrate it had more than 40% membership support – The employer, solely owned by Normoyle, had four employees during the relevant time period – McCarthy, the inside union organizer, was terminated nine days after being hired, and the day after Normoyle discovered there was a union organizing drive – The Board did not accept that McCarthy was fired for performance deficiencies, for being slow in his work and for being late – The Board noted that the employer did not warn or reprimand McCarthy for these matters at the time they occurred, nor was he allowed any opportunity to change – The Board found the totality of the performance issues were of no consequence to Normoyle at the time they occurred because he did not act on them – The Board further found that the timing of the termination, one day after Normoyle discovered that McCarthy was involved in the union organizing the work place, was significant in light of the lack of employer-demonstrated reasons for termination – The Board found that McCarthy was fired because he was behind the union organizing drive and this was a breach of the Act – The Board then turned to the appropriate remedy under s. 11 recognizing that it can only certify without a representation vote where "no other remedy would be sufficient to counter the effects of the contravention" – The Board found that the employees could not freely express their wishes in a representation vote in the context of a discharge of an individual associated with union activity – The employer's actions served two purposes: stopping the union organizer from accessing employees and sending a message to employees that support for the union meant job loss – The Board found that a representation vote with ancillary relief would be insufficient to counter this effect – The union's application under s. 11 was granted and the union was certified – Application granted

1443760 ONTARIO INC. OPERATING AS SWING STAGE EQUIPMENT RENTALS OTTAWA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93..........(May/June) 485

Construction Industry – Certification – Certification Where Act Contravened – Unfair Labour Practice – The union sought automatic certification under s. 11 of the Act, alleging that the owners of the respondent company had contravened ss. 70, 72 and 76 – The union alleged that a company owner had phoned and physically threatened the outside union organizer, and a "captive audience" meeting was held during which physical threats against union organizers and threats to job security were made – The Board held that threatening a person who acts on behalf of a union with physical violence was a violation of both ss. 70 and 76 –The Board also held that even though no employee was directly threatened with violence at the meeting, the offer of money by one of the owners to anyone who would punch a union organizer was a suggestion of violence that necessarily has the effect of creating a climate of intimidation – The Board held that that comment was a violation of ss. 70 and 72(c) – The Board held that statements made by the owners at the meeting that the company may lose customers, that the employees would have to drive their own vehicles (rather than company vehicles) at their own expense if they had to work for another employer, and the general statement that there could be job cuts, reductions and lost hours if the union won all constituted threats to job security and amounted to a violation of ss. 70, 72(c) and 76 of the Act – The physical threats and

threats to job security created an atmosphere in which employees were unable to express their true wishes "free of the shadow of repercussions by the employer" – Automatic certification granted – Certificate Issued

EAST ELGIN CONCRETE FORMING LIMITED; RE LIUNA, LOCAL 1059 ....(Jul./Aug.) 741

Construction Industry – Certification – Employee – Membership Evidence – Practice and Procedure – Reconsideration – In a request for reconsideration of a successful certification application where the employer had provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis – The handwriting expert determined that it was highly probable that the person who signed the affidavit had also earlier signed the membership evidence – The responding party submitted that the employee in question admitted that the signature on the membership card was his – Request for reconsideration withdrawn

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..(Mar./Apr.) 396

Construction Industry – Certification – Employee – Practice and Procedure – Status – The employer sought to remove two names from its list of employees at the Regional Certification meeting for one of two proffered reasons: either because they were performing work of a different craft or they were independent contractors – The Board refused to allow the employer to alter its list – The prejudice to the union in having to attempt to ascertain what work the employees were doing on an ordinary day two months earlier was significant and perhaps impossible to overcome – Secondly, the facts pleaded by the employer to establish independent contractor status were equivocal and therefore also prejudicial – Motion dismissed – Matter continues

MELANDI DRYWALL SYSTEM INC.; RE IUPAT, LOCAL 1891...............(Nov./Dec.) 1075

Construction Industry – Certification – Employer – Practice and Procedure – Related Employer – Timeliness – The Board found nothing wrong with the application naming three possible employers as responding parties: the applicant specifically referenced subsection 1(4) and asked that the certificate name all three entities – The responding party filed its response five days late but asked the Board to exercise its discretion to accept the late-filed information in accordance with the ruling of the Divisional Court in *Maystar* (see [2007] OLRB Rep. March/April 459) – The Board examined possible criteria for the exercise of discretion: the nature of certification applications and the need for speed in their determination; the reasons for the late filing; prejudice to the applicant – The Board finds that prejudice is present in every case, and will be the same in every case – In the circumstances of this case, the Board does not exercise its discretion to accept the late-filed information – The applicant delivered its materials to three fax machines for the three employers; personal delivery is not a requirement of the Act or the Board's Rules – Time extension allowed for response to related employer allegations – Matter continues

REIDS UPTOWN HOMES, REIDCO NORTH LTD., S.R. PROPERTIES INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL ....(May/June) 633

Construction Industry – Certification – Employer – The Board had to determine the identity of the employer in this application for certification – Wallworks obtained a contract to install fabric wall panels - ACTT bid on the installation of the panels at the behest of Wallworks, but was not awarded the contract because the work had to be performed by a union sub-contractor – Wallworks retained the services of Fabric Interior, who hired T, the president of ACTT to train and supervise the work – T invoiced Fabric on an hourly basis for his time, and for the ACTT equipment used on the project – T contacted the hiring hall and supervised the employees for the duration of the project – Employee cheques were paid by Fabric, and ROEs were issued by Wallworks - The Board found, applying the criteria from *York Condominium*, that the fundamental control over the employees was held by ACTT, so it was their employer – Certification granted

ACTT INSTALLATION LTD.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93 .... (Mar./Apr.) 300

Construction Industry – Certification – Evidence – Judicial Review – Natural Justice – Practice and Procedure – Reconsideration – The Carpenters moved to set aside the decision of a single judge of Divisional Court permitting the employer to rely on an affidavit in support of its judicial review application of the Board's certification decision (see [2006] OLRB Rep. September/October 756*)* – A full panel of the Divisional Court held that the motions judge was not "clearly wrong" in concluding that one paragraph of the affidavit ought to be received by the reviewing panel in support of the employer's allegation that it was denied natural justice by the Board – The balance of the affidavit, however, should be struck because it contains material not before the Board and it is clear the Board's decision was rendered on the basis of evidence before it – The "new evidence" foundation for judicial review cannot succeed – Motion allowed in part

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND ONTARIO LABOUR RELATIONS BOARD .... (Jan./Feb.) 249

Construction Industry – Certification – Intervenor – A number of trade unions and employer bargaining agencies sought to intervene as *amicus curiae* in this certification application, arguing they wanted to present the Board with views regarding the undesirability of having the applicant trade union succeed and the potential destabilization in the construction industry should the applicant be found to be a trade union (its status has not yet been established) – The Board rejected the intervention of those seeking *amicus curiae* standing, relying on its own significant knowledge and experience in construction – When the Formwork Council challenged some of the voluntary recognition agreements relied on by the applicant, the applicant was invited to respond to the challenge – The Carpenters alleged the respondent employer was related to companies they were pursuing in another Board application – Application for certification joined with other Carpenter applications – Matter continues

PBS GENERAL CONTRACTORS INC.; RE CANADIAN CONSTRUCTION WORKERS' UNION; RE DRYWALL ACOUSTIC LATHING AND INSULATION, LOCAL 675; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE TABRCO MANAGEMENT LTD.; RE TARGET DRYWALL & ACOUSTICS LTD. .... (Jan./Feb.) 163

Construction Industry – Certification – Judicial Review – The Board certified the Painters' union in this card-based application when the employer failed to file a response in a timely fashion pursuant to s. 128.1(3) – In its request for reconsideration of the Board's decision certifying the union, the responding party relied on the fact that it had delivered its response to the union in a timely manner but, through inadvertence, had failed to file the response with the Board – Relying on *Air-Kool*, the Board held that it had no discretion to extend the time to accept the response – On judicial review, the court held the Board to a standard of correctness and found the Board had erred in interpreting s. 128.1(3) as a limit on its ability to accept a late filing – The word "shall" in the provision was a directory imperative, but aimed only at the employer, not the Board – Application for judicial review granted

MAYSTAR GENERAL CONTRACTORS INC.; RE IUPAT, LOCAL 1819; RE ONTARIO LABOUR RELATIONS BOARD .... (Mar./Apr.) 459

Construction Industry – Certification – Membership Evidence – *Prima facie* motion – Practice and Procedure – Representation Vote – Unfair Labour Practice – The Company alleged that when employees signed membership cards they were confused and/or misled and did not realize what they were signing nor what the membership cards would be used for – First, the Board found that the allegations, even if true, do not breach s. 5 (the section cannot be violated); s. 15 (no particulars of employer domination); s. 70 (a union is not a "person" and was not acting as an "employer", hence it cannot violate the provision); or s. 76 (there was no "intimidation or coercion") – Accordingly, the Board dismissed the s. 96 complaint – Second, the Board found that these circumstances could give rise to the exercise of the Board's discretion to order a vote under s. 128.1(13)(b), even where the Union has more than 55% membership evidence, and accordingly, it dismissed the union's prima facie motion on this issue – Finally the Board refused to order disclosure of employee statements since the statements were covered by litigation privilege (collection of information by Company's counsel concerning what employees were doing on the date of application), and the balancing of competing interests also led to that conclusion – That is, since the information recorded in the statements would be given little, if any, weight (they were collected three to five weeks after the date of application), the potential undermining of the adversarial litigation process (by ordering the disclosure) outweighed any potential value that these statements had – Unfair Labour Practice complaint dismissed – Certification application continues

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486......................(Nov./Dec.) 1079

Construction Industry – Certification – Non-Construction Employer – The Labourers filed two applications for certification simultaneously (industrial and construction), seeking to represent the employees of ReNu engaged in the dismantling and removal of metal fixtures at a moribund steel manufacturing facility – The Board found that the predominant nature of the work the employees were performing was "demolition" and therefore construction – Secondly, the Board examined whether ReNu could qualify for the non-construction employer exemption – The Board found that ReNu was not performing construction work for which it could expect compensation from a third party; rather, ReNu was salvaging the metal and reselling it as part of the salvage operations – Application for construction certification dismissed – Non-Construction employer status granted – Application for industrial certification referred to Manager of Field Services to count ballots

RENU RECYCLING INC.; RE LIUNA LOCAL 837. ....(Jan./Feb.) 177

Construction Industry – Certification – Practice and Procedure – The responding party delivered its response to the union in a timely way, but failed to file a timely response with the Board since it had not realized that its facsimile report read "Busy, no response" and was not received by the Board – The Board followed the Divisional Court's decision in *Maystar* and decided to exercise its discretion to allow the late filing on three grounds: the union consented; the union was not prejudiced since they had received the response in a timely way; and when the respondent was informed of the problem they immediately filed their response – Matter continues

GAGNON DEMOLITION INC.; RE LIUNA, LOCAL 625 .... (Mar./Apr.) 358

Construction Industry – Certification – Practice and Procedure – Timeliness – The Board finds that in a card-based application for certification, there is no prejudice to the union if the responding party fails to provide the response to the union at the same time it files it with the Board – The response was delivered to the applicant one week after it was due – The Board relieves against the late delivery of the response – Matter continues

LEMMO MASONRY INC.; RE LIUNA LOCAL 527 .... (May/June) 584

Construction Industry – Certification – Practice and Procedure – Status – Timeliness – The respondent employer sought to add an employee to the bargaining unit two weeks after the application for certification was first filed – The Board held that the Divisional Court's ruling in *Maystar* [2007] OLRB Rep. March/April 459 regarding the Board's discretion to consider late evidence filed by a responding party applies to these circumstances – The Board noted that the ability of a trade union to determine what tasks an employee performed on the date of application "diminishes by the hour," but that prejudice to the union as a result of late filing of information will not result in every case – The Board held that the two-week delay in notifying the Board coupled with a failure to notify the union earlier would result in prejudice to the union if the employee was included on the list – The Board rejected the argument that the employer could act as a proxy for the employee holding that there was an adequate process for the employee to assert his right to participate – The Board also held that it is not for the employer to raise the rights and interests of an employee, particularly where the employee himself has not sought to assert that he is an employee in the bargaining unit – The Board denied the request of the respondent to add the employee to the list – Matter continues

STRUCT-CON CONSTRUCTION LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL .... (Jul./Aug.) 810

Construction Industry – Certification – Practice and Procedure – Representation Vote – Unfair Labour Practice – LIUNA filed membership evidence in excess of 55% in support of this card-based application for certification – The responding party alleged that the union had acted improperly in its collection of membership evidence by assuring the employees they were only signing cards to get a vote and by advising the employees that the employer was supportive of the union – Further, a number of employees wrote to the Board stating that they did not wish to belong to the union, and requesting a representation vote – The Board ruled that the fact an employee signed a membership card but later had a change of heart would be irrelevant to the exercise of its discretion in certifying the union – The Board was concerned, however, about the employer's allegations and considered its options: to certify the union, to order a vote, or to dismiss the application – The Board determined that it should set the matter down for hearing to hear evidence about the allegations attributed to the union's organizers - Matter listed for hearing

HILLSIDE SOD LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ....(Nov./Dec.) 1037

Construction Industry – Certification – Practice and Procedure – Where the responding party makes specific allegations about improper statements having been made by the applicant's representatives during the collection of membership evidence, the Board's Rules require that the applicant be advised of the dates, places and times the alleged statements were made, but the disclosure of the names of the people to whom the alleged statements were made was not required to be produced – Application continues

HILLSIDE SOD LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ....(Nov./Dec.) 1040

Construction Industry – Certification – Practice and Procedure – In a card-based certification application the employer responded over two weeks late, giving as a reason that the owner's first language was not English and that he did not understand the documents – The Board exercised its discretion to permit the employer's late filed information concerning one issue (whether two persons were independent contractors), but refused to grant it with respect to the other (whether the employer may add someone to the list) – On the first issue the Board found the delay would not significantly prejudice the union since the information—nature of the relationship—was not time sensitive; whereas the latter point, whether someone was at work on the day of application, would cause significant prejudice to the union given the company's delay – Matter continues

VICTOR CHADI o/a VICTOR HUGO DRYWALL; RE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ....(Nov./Dec.) 1168

Construction Industry – Certification – Reconsideration – Trade Union Status – The Carpenters sought reconsideration of a Board decision granting the Sheet Metal Workers trade union status (unreported Board decision, June 20, 2007) in eight certification applications – The Carpenters argued that the Board denied them procedural fairness by not allowing them to adduce evidence relating to an earlier finding of status involving different employees and employers – The Board held that it acted properly in refusing the Carpenters the opportunity to lead evidence on the earlier files: first, the Board assumed all of the material facts and particulars pled concerning the earlier applications to be true; secondly, the parties in those matters were not before the Board; and finally, the Sheet Metal Workers had agreed not to rely on those earlier cases, but to establish its trade union status *de novo* – The Board further held that if the Carpenters wished to pursue their allegations of impropriety relating to the earlier files, there were processes available to them for doing so under the Act; the Board specifically did not rule on what effect or consequences any findings of fault in those unfair labour practices might have on the eight certification applications – Matter continues

EASTERN EAVESTROUGHING LTD.; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51; RE CARPENTERS & ALLIED WORKERS LOCAL 27, CJA ....(Jul./Aug.) 758

Construction Industry – Certification – Reconsideration – Unfair Labour Practice – The Board was asked to reconsider its dismissal of a certification application; the dismissal was based on the Board's finding that a particular individual was performing bargaining unit work on the application date and was therefore included in the unit, reducing the applicant's requisite support for card-based certification; in a vote, conducted earlier on agreement of the parties, the union had lost – At the reconsideration hearing, the applicant adduced credible evidence that the impugned employee's time card had been altered to show he performed bargaining unit work and not office work, and the applicant only learned of the tampering after the dismissal of the application for certification – The Board found the employer violated s. 70 of the Act –Reconsideration granted, dismissal revoked, certificate issued

KOOL FAB MECHANICAL INC.; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION ....(Jul./Aug.) 774

Construction Industry – Certification – Remedies – Unfair Labour Practice – In this request for remedial certification the Board found: First, that the second-in-command asking employees if they had signed cards was intimidatory – Second, that the owner's statements without consequences, actual or intended, do not become unlawful statements simply because an employee overhears them in circumstances where it was not reasonable to expect that employee to overhear them – However, the owner's attempt to conduct surveillance on a meeting being held after hours (and off employer or customer property) for the purposes of discovering who might be interested in the union was improper and was a violation of s. 70 – Third, that a lay-off due to a temporary downturn in work was not tainted by any anti-union animus – This conclusion was supported by the fact that the employee did not actively demonstrate support for the union, and he was not involved in trying to recruit others; further, the employer offered him his job back two weeks later – Fourth, that the lay-off of the union's key inside organizer was in fact a discharge in violation of s. 72 – The Board held that while the employer did contravene the Act, these violations and the termination of the inside organizer, were not so serious that the Board could conclude that section 11 was the only appropriate remedy – Therefore, the Board ordered compensation to the inside organizer and a posting – ULP Application allowed, in part; Certification dismissed

L & L PAINTING AND DECORATING LTD.; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL UNION 557 .... (Sept./Oct.) 887

Construction Industry – Certification – Representation Vote – Unfair Labour Practice – Remedies – The union filed an application for card-based certification as well as an unfair labour practice complaint alleging violations of ss. 70, 72 and 76 of the Act – Because the Board had earlier determined that 40 to 55 percent of the employees in the bargaining unit were members of the union on the date that the application for certification was filed, the Board directed that a representation vote be held and counted forthwith (The union had asked the vote to be deferred until after the ULP was determined) – The Board held that if the union does not obtain 50 percent of the votes cast in the representation vote, s. 11(2) of the Act is still applicable and the unfair labour practice complaint will be heard – Matter continues

DOUBLE H CONCRETE FORMING; RE LIUNA, LOCAL 1059 ....(Nov./Dec.) 1030

Construction Industry – Certification – Status – Trade Union – The Board provided reasons for granting the Canadian Construction Workers' Union trade union status in the construction industry – After the Board rejected (in other previous decisions) the requests from various trade unions to intervene in the certification application, only the Painters and Carpenters were left to challenge the CCWU – The CCWU had altered its bargaining unit description to include only construction labourers working in the residential sector in Board Area 8 – The evidence established that the work being performed by the employees was concrete chipping and clean-up – The objections raised by the Painters and Carpenters were dismissed because their dispute was of a jurisdictional nature, rather than a challenge to bargaining rights for their particular crafts – The Board found that the CCWU had taken all necessary steps to establish itself as a trade union, and that it provided adequate evidence to meet the threshold that would identify it as a trade union pertaining to the construction industry – Certificate granted

PBS GENERAL CONTRACTORS INC.; RE CANADIAN CONSTRUCTION WORKERS' UNION.. (Mar./Apr.) 412

Construction Industry – Certification – Unfair Labour Practice – The employer alleged in post-vote representations that the union had engaged in misconduct that affected the employees' expression of their true wishes – The Board found that: (1) an employee's statement that the union "took care of" him was ambiguous; (2) the provision of travel expenses, overnight accommodation and unlimited food and drinks to the employees by the union to secure the employees' votes did not amount to intimidation or coercion; (3) the union's offers of premium employment to one of the employees was not improper; (4) a threat to cause an employee's discharge was a type of economic intimidation – Matter set down for hearing to hear *viva voce* evidence on the final allegation

VANSMIT LTD. O/A JAY-DEE CONCRETE FORMING; RE LIUNA, LOCAL 625...(Nov./Dec.) 1164

Construction Industry – Collective Bargaining – Duty to Bargain in Good Faith – Intervenors – Parties – Unfair Labour Practice – Three of five constituent member associations of PEBAL filed a complaint alleging the LEBA together with the other two constituent members of PEBAL breached s. 17 of the Act – The applicants allege that LEBA and the two other constituent members, by entering into agreements extending the scope of their appendices and subcontracting provisions, have forced a recognition issue to impasse, since PEBAL cannot adopt an agreement entered into by some members that has a direct negative impact on its other members – The Board found that just as there is no duty to bargain in good faith owed to employees, there is no duty owed to the constituent members of PEBAL – The Board further noted that while it is charged with determining the applications or complaints that are filed with it, the Board must be satisfied the applicants do not just have an interest in the matter, but have the legal right to proceed with the complaint – Here the Board found since there is no duty on LEBA to bargain in good faith with the constituent members of PEBAL, the applicants do not have the legal right to assert that LEBA violated the duty to bargain in good faith owed to PEBAL – Finally the Board characterized this matter as one of a complaint about the manner in which two of the five constituent members of PEBAL have dealt with the other three members (and how LEBA has taken advantage of this schism), and not as one encompassed by s. 17 of the Act – Application dismissed

ONTARIO MASONRY CONTRACTORS ASSOCIATION; RE CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF ONTARIO; RE SEALANT AND WATERPROOFING ASSOCIATION; RE INDUSTRIAL CONTRACTORS ASSOCIATION OF CANADA; RE CONCRETE FLOOR CONTRACTORS ASSOCIATION OF ONTARIO..(May/June) 600

Construction Industry – Collective Bargaining – Interference with employers' organization – Intervenors – Parties – Unfair Labour Practice – Three of five constituent member associations of PEBAL filed a complaint alleging the LEBA together with the other two constituent members of PEBAL interfered in the administration of the employers' organization contrary to s. 71 of the Act – The Board ruled on four preliminary motions raised by the responding parties – First, the Board found that the members of the employers' organization had a direct legal interest in having their organization operate without interference by a trade union and accordingly had standing – Second, the Board declined to determine whether the applicants had pled a *prima facie* case and dismissed the responding parties' motion to dismiss – Third the Board declined to exercise its discretion to refuse to entertain the complaint – Finally, the Board found merit in the responding parties' submissions seeking to defer the matter pending the outcome of an Industrial Inquiry Commission, given that through its mandate the Commission would provide a much better forum for discussing the parties' differences – Adjourned pending release of Commission's report

ONTARIO MASONRY CONTRACTORS ASSOCIATION; RE CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF ONTARIO; RE SEALANT AND WATERPROOFING ASSOCIATION; RE INDUSTRIAL CONTRACTORS ASSOCIATION OF CANADA; RE CONCRETE FLOOR CONTRACTORS ASSOCIATION OF ONTARIO..........(May/June) 607

Construction Industry – Interim Relief – Jurisdictional Dispute – Reconsideration – Remedies – Strike – In the context of a jurisdictional dispute the Board issued an interim order, on reconsideration, assigning the disputed work to the Carpenters, after determining that the Labourers had engaged in strike activity designed solely to influence the assignment of work – The Board noted that the purpose of an interim order in a s. 99 context is to maintain the "status quo" pending the resolution of the application – The Board found that the "status quo" for the disputed work was that it had been performed exclusively by members of the Carpenters – The Board also noted, without deciding, that the Labourers claim to bargaining rights, and therefore a right to strike, at the project in question was problematic – The Board found that the Labourers had not negotiated or concluded any new collective agreements with the struck employers at the project – The only benefit that the Labourers had obtained as a result of the strike was an agreement from the constructor and two contractors to assign the disputed work only to subcontractors who employed members of Labourers – The Board therefore concluded that the sole purpose of the strike was to exert economic pressure on the constructor to assign the disputed work to the Labourers – The Board has consistently found that to engage in a strike in order to secure a work assignment is either unlawful or improper such that it will grant interim relief, whether or not the strike is otherwise lawful – The structure of the Act properly recognizes that pressing the issue of the assignment of particular work to impasse is undesirable, given its effect on the potential rights of parties outside the bargaining process – Such action tends to promote a similar strike response from the third-party union (as occurred in this case), rather than the resolution of the dispute under s. 99 without a work stoppage – The Board's interim order directing that the work be assigned to the Carpenters was not made effective until two weeks after the order, or when it would have been made but for the illegal response strike of the Carpenters – Matter continues

SNC-LAVALIN POWER ONTARIO 1409096 ONTARIO LIMITED C.O.B. AS PERI SCAFFOLDING AND ALUMA SYSTEMS CANADA INC.; RE CARPENTERS DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE LIUNA, LOCAL 506..........(Jul./Aug.) 800

Construction Industry – Judicial Review – Jurisdictional Dispute – The Bricklayers brought an application for judicial review of the Board's decision finding that the employer's assignment of stone masonry work on the Victoria Memorial Museum Building in Ottawa to the Plasterers was correct – All parties agreed that the standard of review was patent unreasonableness when the Board deals with jurisdictional disputes – The court found that the Board "conducted a thorough and careful review of the factors that Board jurisprudence has evolved as relevant and helpful" and that there was a clear "line of reasoning leading to the conclusions reached" – Accordingly the decision was not patently unreasonable and the application was dismissed

IUBAC, LOCAL 7; RE OPERATIVE PLASTERERS, CEMENT MASONS, RESTORATION STEEPLEJACKS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, UNION LOCAL 598 ; RE COLONIAL BUILDING RESTORATION; RE LIUNA, LOCAL 527; RE 921879 ONTARIO LIMITED; RE MASONRY INDUSTRY EMPLOYERS COUNCIL OF ONTARIO; RE ONTARIO MASONRY CONTRACTORS ASSOCIATION..................... (Mar./Apr.) 454

Construction Industry – Judicial Review – Parties – Related Employer – Sale of Business – Settlement – The Council brought a motion to quash the judicial review, characterizing it as prematurely seeking a review of an interim decision of the Board – In the 69/1(4) application the responding party employers brought a motion to the Board to dismiss the application because of Minutes of Settlement purporting to bind the Council and any of its affiliates from bringing such applications for ten years – The Board found that although the individual who signed the agreement on behalf of Local 586 was also the President of the Council there was no evidence that he had actual or ostensible authority to bind the Council – The Board dismissed the employers' motion and the sale of business/related employer applications continued before the Board, although the hearing on the merits had not yet commenced – The employers filed for judicial review –The court found this to be an exceptional or extraordinary situation that should properly be reviewed prior to the Board dealing with the merits – The court also assisted the parties in providing affidavit evidence to reflect the evidence that was before the Board

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO...(Jan./Feb.) 284

Construction Industry – Judicial Review – *Public Sector Labour Relations Transition Act* – Related Employer – Sale of Business – The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – The GECDSB sought judicial review of the Board's ruling – A majority of the Court confirmed the Board's finding that while the *PSLRTA* specifically precludes the application of s. 69 of the *Labour Relations Act, 1995* to events covered by that legislation, nothing in the *PSLRTA* prevented the Board from exercising its discretion under s. 1(4) to the same events – Application for judicial review dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND

ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD ....(Jan./Feb.) 255

Construction Industry – Judicial Review – *Public Sector Labour Relations Transition Act* – Related Employer – Sale of Business – Leave to appeal to Court of Appeal dismissed – Leave to appeal to Supreme Court of Canada dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD ....(Nov./Dec.) 1197

Construction Industry – Jurisdictional Dispute – Remedies – *Trades Qualification and Apprenticeship Act* – The Ironworkers (IW) applied for a declaration and other relief under s. 99 of the Act in relation to hoisting and rigging of piping equipment weighing in excess of two tons carried out by members of the Plumbers and Pipefitters (UA) – The Board found that the majority of the area practice in respect of the work in dispute, when done by contractors bound by agreements with both unions, was assigned to either members of the IW exclusively or to a composite of UA and IW members – The Board further held that the two trade agreements to which the UA and IW were bound in the area remained in force, as they were not inconsistent with area practice – The Board found there was no material difference in terms of economy or efficiency to have UA rather than IW members perform the small amount of work involved, given that both UA and IW members were employed on the project – The Board rejected the UA's argument that s. 3 of O. Reg. 572/99 under the *Occupational Health and Safety Act* limited the performance of the hoisting and rigging work in question to the plumber and steamfitter trades – In doing so, the Board noted that the work that a plumber or steamfitter does is found in s. 1 of their respective trade regulations under the *Trades Qualification and Apprenticeship Act*, and neither regulation limits hoisting and rigging work to one particular trade – The Board found that included in the scope of the work of an IW is the moving and placing of machinery and heavy equipment, which is required in order to perform the work described in para 1 of the IW Regulation – The Board noted, however, that the work of the trades under the TQAA is not synonymous with a union's work jurisdiction – On the basis of the trade agreements, the Board held that the work was properly assigned to members of the IW – Although no provision of the Act specifically allows for a prospective order regarding work assignment, the Board held that s. 99(5) was broad enough to encompass such a power – The Board declared that the hoisting and rigging work in question should be assigned to IW members, and directed the employer to assign that work to them in future

TESC CONTRACTING COMPANY LTD. AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 800; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 786..................................(Jul./Aug.) 817

Construction Industry – Jurisdictional Dispute – The applicants alleged an improper assignment by Strabag of certain work at the Niagara Tunnel Project to members of the Labourers – The applicants asserted that tunneling work did not come within the exclusive purview of the Labourers and submitted that there were a number of other trades actively involved in tunneling work – The Board held that it was imperative to consider the context within which the work was undertaken – The Board was not persuaded that the assignment of the work in dispute by Strabag to members of the Labourers was wrong – Assigning the work associated with the construction of the tunnel to members of the Labourers was consistent with both the area practice and the practice of the electrical power systems sector and accorded with the recognized work jurisdiction of the Labourers – In particular, the existence of the "tunnel exception" in the EPSCA agreements and the incorporation of the tunnel schedule from the Heavy Engineering Association of Toronto collective agreement demonstrated that recognition – Applications dismissed

STRABAG INC.; ONTARIO POWER GENERATION; LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; LIUNA LOCAL 837; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL UNION 736; RE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO, CJA AND ITS LOCAL 1007; ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION .... (Sept./Oct.) 961

Construction Industry – Reference – The Minister of Labour asked the Board if he could accede to a joint request from the Employee and Employer Bargaining Agencies of the plumbers and pipefitters industry (ICI sector) to alter the designated bargaining unit description to include gasfitters and their apprentices – The Board found that the fact that gasfitter was not a distinct craft but rather a task performed by at least two skilled trades was a compelling reason against the requested amendment – The Board distinguished between work jurisdictional claims and descriptions of crafts; describing crafts in a general way promotes the flexibility of the industry to adapt to technological changes – Inserting work tasks may increase uncertainty and litigation in certification applications – The Board advised the Minister that the requested amendment would not serve the interests of the labour relations community and was not necessary to advance or protect the craft of plumber and pipefitter

MECHANICAL CONTRACTORS ASSOCIATION OF ONTARIO; RE IUOE LOCAL 793; RE ONTARIO SHEET METAL WORKERS AND ROOFERS CONFERENCE, SHEET METAL WORKERS INTERNATIONAL UNION LOCAL 285; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP ....(Jan./Feb.) 126

Construction Industry – Trusteeship – The Board issued reasons to support its finding of June 12, 2006 that LIUNA properly exerted its rights to impose trusteeship over Local 183, without violating either s. 147 or 149 of the Act – The Board examined the myriad proceedings and events leading up to the imposition of the trusteeship, including the hearing before and determination of the union-appointed Canadian Independent Hearings Officer (the Keller Award) – The Board found that LIUNA had not in any way altered the jurisdiction of 183 in breach of s. 147 – For purposes of s. 149, the Board looked at the Keller Award as well as the materials presented and arguments made before the Board, and held that the three preconditions for issue estoppel (as argued by LIUNA) had been met – The Board specifically refused to rely on supplementary affidavit material filed before it, stating that that evidence could have been presented to Keller but was not – The Board found that it is inconsistent with the core values of both parent and local to expend union funds for surreptitious surveillance to preserve the positions of those in power, or to approve the forgery of collective agreements – Issue estoppel applied – Trusteeship confirmed

UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183 .... (Jan./Feb.) 231

Construction Industry Grievance – Abandonment – Bargaining Rights – Delay – Labourers 506 grieved that Burling Ranger had violated the provincial ICI agreement by failing to employ members of 506 or failing or refusing to subcontract work to subcontractors in contractual relations with the union – The Labourers relied on a collective agreement signed in 1970 by the applicant and Burling – The responding party argued that the union had abandoned its rights by failing to assert them as long ago as prior to the inception of provincial bargaining – The union served Burling with notice to bargain in the early 1970's, but the employer responded that it had no work in the geographic area – The Board heard evidence relating to subsequent work performed by Burling over an almost thirty-year period, without any assertions by the Labourers to rights under the collective agreement - Grievance dismissed

BURLING RANGER COMPANY INC.; RE LIUNA LOCAL 505 .... (Jan./Feb.) 8

Construction Industry Grievance – Estoppel – The union filed two grievances alleging that Jacobs had performed work incorrectly under the General Presidents' Maintenance Agreement rather than under the provincial ICI agreement for construction, and its members were thereby deprived of higher wage rates – Jacobs argued that the work was properly characterized as maintenance or, in the alternative, the union should be estopped from its claim for relief, or the relief should be significantly reduced because of the late filing of the grievances – A majority of the Board found that work performed on existing equipment and machinery, including replacement of individual items, was maintenance – The changes undertaken by Jacobs did not involve enhancements or additions to a production process; there was no replacement of an entire system, and the change was not designed to increase production – On the other hand, the erection of a new blast-proof shelter and the installation of related cabling for the burner management system was construction; similarly the electrical work around the chloride mitigation tower, as well as the work associated with its new exchangers, was construction – Examining the employer's estoppel argument, the Board held that there is a distinction between an estoppel against the application of a provincial agreement and the estoppel against the application of a public statute: in specific circumstances, based on equity, it might be unconscionable for a particular beneficiary of rights under a provincial agreement to enforce those rights – In this case, the work contemplated by Petro-Canada and Jacobs was maintenance, the various trades were consulted and agreement was reached, and the work was performed without complaint by other than the applicant – The Board found that the union's representative had agreed that the projects would be conducted as maintenance, and that Jacobs had relied on this representation to its detriment –The estoppel argument succeeded - Grievances dismissed

JACOBS CATALYTIC INDUSTRIAL SERVICES LTD.; RE IBEW, LOCAL 353; RE GENERAL PRESIDENTS MAINTENANCE COMMITTEE FOR CANADA AND THE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO... (Nov./Dec.) 1043

Construction Industry Grievance – Evidence – The Labourers grieved the lay-off of the entire complement of "referred members" on a job-site, that left only "name-hires" as part of the employer's work crew – The Board examined the language of the collective agreement which advocated a 50/50 rule – The Board found the employer had no explanation (reasonable or otherwise) for the manner in which it laid off the employees, therefore it had violated the lay-off provision of the collective agreement – With respect to the subsequent recall of one employee, the Board held that a "name-hire" or "referred employee" retains his or her status for the period in the collective agreement during which the employee can be recalled (i.e., a referred employee cannot be laid off and then re-hired within the relevant period as a name-hire) – Grievance allowed, matter remitted to parties to fashion appropriate remedy

E.S. FOX CONSTRUCTION LTD.; RE LIUNA, LOCAL 506........................ (Mar./Apr.) 346

Construction Industry Grievance – Health and Safety – The union complained that the employer had requested an additional drywaller, then chose not to hire the worker when it learned he did not have fall arrest training, a requirement under the *Occupational Health and Safety Act* which would qualify him as a "competent worker" – The Board found that the collective agreement at the time did not require fall arrest training for workers for them to be considered competent, therefore the employer had no legitimate reason to consider the dispatched worker not competent – The collective agreement did contemplate, however, that the employer retained the exclusive right to make decisions regarding hiring and staffing levels – Although the employer requested an additional worker, it did not hire the employee referred from the hiring hall and ultimately used only its existing complement to complete its contract – The employer did not violate the collective agreement by failing to employ the worker – But because the worker sent to the employer was competent, the union was entitled to damages under the collective agreement for the referral – Grievance allowed in part

ROSMAR DRYWALL & ACOUSTICS LTD.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18..........................(Nov./Dec.) 1092

Construction Industry Grievance – Jurisdictional Dispute – Remedies – Following a finding that Bondfield had incorrectly assigned drywall taping work to the Painters in the Kingston area, the Bricklayers sought damages for the breach – The Board canvassed its jurisprudence in JD-related damage claims, where it asks: was the action of the employer substantively unreasonable or was there procedural unreasonableness in the employer's decision-making process? – In this case, the Board found that the assignment by Bondfield clearly violated two important factors that would constitute indicia of unreasonableness (an earlier Board decision; and area practice) – Bondfield argued that its actions were not unreasonable and, in any event, it was not the employer proper since it had subcontracted the taping work to Oakdale, a party bound exclusively to the Painters agreement – The Board held that a work assignment which flies in the face of an unequivocal earlier Board ruling involving the same three parties amounts to second guessing the Board decision and will not be countenanced; a claim for work on the basis of a Board decision in a JD is superior to other claims based on other factors – Grievance allowed; quantum of damages remitted to the parties

BONDFIELD CONSTRUCTION; RE BRICK AND ALLIED CRAFT UNION OF CANADA, LOCAL 10 AND INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 10 ....(May/June) 499

Construction Industry Grievance – Jurisdictional Dispute – The Sheet Metal Workers challenged the assignment of covers for columns in an office building atrium to the Carpenters – The Board determined that the dispute involved only 12 of 27 columns, because it centred on the air-handling features at the top of the particular columns – The unions agreed that each of them had the authority to perform the work, and that the Board's traditional criteria for resolving jurisdictional disputes for the most part were either not present or not helpful – The Board accepted the Carpenters' submission that it should therefore have regard to the practical realities of how the construction unfolded on a day-to-day basis – Since the erection and covering of the columns had been contracted to a drywall contractor in a bargaining relationship with the Carpenters, it would have been inefficient to import the Sheet Metal Workers and try to integrate them into the other construction work being carried out – The Board held that the work was properly assigned to the Carpenters, and the Sheet Metal Workers' grievance was dismissed

SMITH BROTHERS CONTRACTING CORP.; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 473; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION AND UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1946 .... (Sept./Oct.) 948

Construction Industry Grievance – Settlement – Following a Board ruling that found the employer related to another unionized company and, thereby, bound by the provincial ICI agreement, the union filed two grievances respecting the assignment of work to its members; the employer filed its own grievance, complaining that the union would not accept its existing employees into membership; all three grievances were dealt with by the Labour Management Relations Committee of the grievance procedure, with the union succeeding on all counts – The issues were referred to the Board with the union arguing the LMRC's decision was a settlement enforceable by a Board decision, and the employer stating the LMRC did not issue a decision but if it did, it could not and should not be enforced – The Board held that the actions of the LMRC did constitute a decision, the issue to be determined being its enforceability – The Board examined the language of the iterations of the collective agreement dating back to 1992 (when an LMRC decision was in dispute) and found significance in the changes in wording referring to "parties to the collective agreement" as opposed to "parties to the grievance" – The greater precision in identifying whose rights are at stake in the LMRC decision caused the Board to reject the union's preliminary motion that the decision was enforceable as a settlement – Matter continues

INDUSTRIAL REDI-WORKS INC.; RE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO AND ITS LOCAL 1916 .... (Mar./Apr.) 381

Construction Industry Grievance – Settlement – The Carpenters acknowledged they received a certified cheque from the responding party as part of a settlement – They further acknowledged having signed a release – The Carpenters lost the cheque and requested a hearing to enforce the settlement agreement – The Board found the responding party had lived up to its obligations; that the applicant received the consideration contemplated by the release, and that the loss or destruction of the cheque while in the applicant's possession does not make the responding party liable to replace it – Grievance referral dismissed

J & A GENERAL CONTRACTORS INC.; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA .... (Jan./Feb.) 115

Construction Industry Grievance – The IBEW sought enforcement of the provincial collective agreement for the electrical maintenance work it performed for Comstock at the Redpath Sugar Plant – Comstock denied being bound to the collective agreement and asserted it had entered into a General Presidents' Maintenance Collective Agreement – In the alternative, Comstock argued the IBEW was estopped from enforcing the principal agreement – The Board surveyed the parties' historical relationship, earlier grievances, local agreements, membership authorizations and continued efforts of various protagonists to enter into a GPMCA – Relying on s. 57 of the Act, the Board found that Comstock is bound by the principal agreement by virtue of its membership in the greater Toronto Electrical Contractors' Association, notwithstanding the apparent conduct of the parties (including the implementation of the GPMCA) which points to the opposite conclusion – As such, and pursuant to s. 55 of the Act, the GPMCA could not be enforceable absent the consent of the parties to the principal agreement - The Board further found that the elements of estoppel had been made out, but applied a time restriction to its enforceability – Grievance allowed

COMSTOCK CANADA LTD.; RE IBEW LOCAL 353 .... (Jan./Feb.) 65

Construction Industry Grievance – Trade Union – In this referral of a grievance filed by OPG concerning the entitlement of former employees to severance payments, the Board addressed the preliminary question whether it had the jurisdiction to hear the grievance, given the Machinists' position that it was not a construction industry trade union – The Board, following *Ontario Hydro*, held that "a history of representing construction employees separate and apart from other employees" must be established for a union to be a construction industry union, and the various union practices relevant in establishing such a history were that a construction trade union usually operates: a hiring hall, an out-of-work list, health, welfare, pension or other benefit plans, either jointly with employers or alone, and a training or apprenticeship program – The Board considered it significant that the members at OPG had exactly the same status within the union as all of the other clearly non-construction members, and had never sought separate status, rights, or representation – There was also no evidence of the Machinists ever having bargained their agreements with OPG or Ontario Hydro together with any building trade unions or as part of a council of such unions, but rather there was direct evidence that the Machinists had always bargained their agreements alone – Although the Machinists/OPG collective agreement did contain certain provisions which were far more common within construction as opposed to non-construction collective agreements, the actual practices of the Machinists were far more in keeping with those of a non-construction union – Ultimately the Board stated that the trade union definition in s. 126, and specifically the words 'pertains to,' should be given a restrictive interpretation in order to accomplish the separation in the Act between construction and non-construction – The Board held that the Machinists were not a construction trade union, and therefore the Board had no jurisdiction to determine this grievance – Grievance dismissed

ONTARIO POWER GENERATION INC.; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS .... (Sept./Oct.) 927

Contempt – Consent to Prosecute – Order for Productions – Practice and Procedure – Related Employer – Sale of a Business – In the context of a s. 69/1(4) application, the Board issued a Confidentiality Order pertaining to documents produced by the responding parties – The responding parties subsequently alleged that the union breached the Confidentiality Order – The union argued the Board had no jurisdiction to consider such a breach – Dealing only with jurisdiction, the Board found that the issue of the breach and enforcement of Orders is one of mixed fact and law and, as such, falls within its jurisdiction – The Board noted that a part of its practice and procedure includes the power to compel the production of documents and to grant Orders protecting the confidentiality of such documents – The Board further noted that if it could not make determinations regarding a possible breach of a Confidentiality Order, such orders would be rendered meaningless – The Board rejected the union's contention that the responding parties had not provided sufficient particulars of their allegations, and that the Board's consideration of the issue would result in undue delay and a waste of the Board's time – The Board found that the fact that it may state a case to the Divisional Court for contempt or may grant a consent to prosecute merely confirms the Board's jurisdiction to consider the issue – Matter continues

KIMBERLY-CLARK CORPORATION AND KIMBERLY-CLARK INC.; NEENAH PAPER, INC. AND NEENAH PAPER COMPANY OF CANADA; BUCHANAN FOREST PRODUCTS LTD., TERRACE BAY PULP INC. AND EAGLE LOGGING INC.; RE UNITED STEELWORKERS LOCAL 1-2693 ....(Jul./Aug.) 765

Delay – Abandonment – Bargaining Rights – Construction Industry Grievance – Labourers 506 grieved that Burling Ranger had violated the provincial ICI agreement by failing to employ members of 506 or failing or refusing to subcontract work to subcontractors in contractual relations with the union – The Labourers relied on a collective agreement signed in 1970 by the applicant and Burling – The responding party argued that the union had abandoned its rights by failing to assert them as long ago as prior to the inception of provincial bargaining – The union served Burling with notice to bargain in the early 1970's, but the employer responded that it had no work in the geographic area – The Board heard evidence relating to subsequent work performed by Burling over an almost thirty-year period, without any assertions by the Labourers to rights under the collective agreement - Grievance dismissed

BURLING RANGER COMPANY INC.; RE LIUNA LOCAL 505 ....(Jan./Feb.) 8

Delay – Abandonment – Bargaining Rights – Certification – Construction Industry – In 1998, Local 183 filed an application for certification for all the construction labourers of the respondent, Beamish – A vote took place and 23 of the 36 votes were challenged but the application was never disposed of – In November 2006 Local 183 brought an application for certification for the same bargaining unit – Beamish took the position that the 1998 application was still outstanding and that the 2006 application indicated Local 183's intention to withdraw the 1998 application – Beamish further argued that the Board should treat the 1998 application as having been withdrawn by Local 183, with a bar subject to subsection 7(10) of the Act – Local 183 offered no explanation for the delay or for why the 1998 application was never concluded – Absent any explanation for the delay, the Board dismissed the 1998 application as being abandoned as of the date of the present decision – The Board declined to characterize the 2006 application as a request to withdraw the 1998 application and thus determined that mandatory bars imposed pursuant to subsections 7(10) and 10(3) were not applicable – The Board did exercise its discretion pursuant to subsection 111(2)(k) and barred Local 183 for six months from the date of this decision from making an application for certification to represent the members of the bargaining unit of Beamish – Both applications (1998 and 2006) dismissed

K.J. BEAMISH CONSTRUCTION SERVICES LTD. RE LIUNA LOCAL 183 ....(Jan./Feb.) 116

Delay – Duty of Fair Representation – Judicial Review – The applicant brought a motion before a single judge of the Divisional Court to overturn the Court's Registrar's dismissal of the application for judicial review for failure to perfect in a timely way (the applicant had lost a duty of fair representation complaint at the Board, because of undue delay) – The judge found no compelling reasons to vary the Registrar's ruling and confirmed there was nothing patently unreasonable about the Board's decision – Motion dismissed

KOSTANTINOS IAONNIDIS; RE ATU LOCAL 1572, CORPORATION OF THE CITY OF MISSISSAUGA, TRANSPORTATION AND WORKS DEPARTMENT, TRANSIT DIVISION .... (Jan./Feb.) 291

Dependent Contractor – Employee – Employment Standards – The applicant sought a review of a refusal to issue an Order to Pay arguing that he was an employee of the company, not a subcontractor –The Board found the commercial subcontract agreement between the applicant and the employer was not proof of their true relationship: all the applicant brought to the relationship was his labour as a janitor; he engaged in no promotion to secure the job; he had virtually no say in setting the terms and conditions (including the non-negotiable monthly pay) set out in the agreement; and he did not provide his own equipment or supplies – In distinguishing *Clara-Ester Cleaning Services* the Board found the Act was intended to protect a person such as the applicant—one who lacked bargaining power and was economically dependent upon the employer – The Board held that the applicant was an employee as defined by the Employment Standards Act – Application allowed

SUPERIOR-1 CLEANING SERVICES LTD.; RE HOSSEIN MOHAMMADI and THE DIRECTOR OF EMPLOYMENT STANDARDS .... (Nov./Dec.) 1098

Discharge – Health and Safety – Reprisal – The applicant complained that she had been discharged for raising health and safety concerns associated with some renovations undertaken by the employer – The Board found the employer had addressed the employee's concerns in several ways, including changing the employee's shift – The Board held that the applicant had simply decided to move on to a job she knew was available to her, and wished to take advantage of what had transpired in the workplace to seek a monetary benefit – Application dismissed

IVY VETERINARY SERVICES; RE KRISTINE NEVILLE; RE DR. CATHY EMMS .... (May/June) 563

Discharge – Employment Standards – The applicant asserted that her pregnancy played a role in the employer's decision to terminate her – The onus of establishing that there was no contravention of section 74 of the Act lies on the employer – The Board was satisfied that the employer fulfilled its burden; the Board drew no adverse inference from the employer's failure to call the employer's spouse when the applicant had not asserted in her application or at the hearing that the spouse was aware of the pregnancy – Application dismissed

RAJAE ELALAMI; RE DR. EMAD HANNA AND DIRECTOR OF EMPLOYMENT STANDARDS .... (May/June) 629

Discharge – Health and Safety – Reprisal – The applicant challenged her dismissal as a bus driver for the disabled – She was discharged after four incidents within a twelve-month period (three accidents and an instance of driving while her licence was suspended) – The applicant argued that every time she found a problem with her bus, or requested a change of bus because of an apparent malfunction, she was exercising her rights under the *Occupational Health and Safety Act* – The Board held (1) these concerns were handled by the maintenance department of the employer, (2) management was never made aware of them, and (3) these concerns could not be construed as an exercise of health and safety rights within the meaning of the Act – The Board found that progressive discipline was levied against the applicant in accordance with management policy and the collective agreement, and that termination was the appropriate response to the culminating incident – Application dismissed

TRANSHELP OF THE REGIONAL MUNICIPALITY OF PEEL; RE KYM URRY; RE CUPE LOCAL 966 .... (Jan./Feb.) 215

Discharge for Union Activity – Interim Relief – Unfair Labour Practice – The employer laid off 45 of the most junior employees due to a reduction in demand from its sole customer – The employer initially told its employees that they would be recalled by seniority – The employer then told its employees that the lay off would be permanent – Approximately eight months later, the employer recalled three employees – The union argued that one of the laid off employees, a known union organizer, was not recalled according to seniority – The union sought interim reinstatement pursuant to s. 98 of the Act for the 45 laid off employees, according to their seniority and the employer's need – The employer argued that the lay off lasted longer than 13 weeks and the three individuals were new hires – The Board relied on the fact that the union was not actively soliciting support in the form of membership cards and that there was no impending representation vote – The Board held that the union was not in a particularly vulnerable point in its campaign to establish bargaining rights – The Board was not persuaded that the relief was necessary to prevent irreparable harm and accordingly, the union's application did not meet the condition in clause 3 of s. 98(2) of the Act – Interim Relief denied

INTERNATIONAL UNION UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CLC); RE WALLACEBURG PREFERRED PARTNERS CORP. .... (Nov./Dec.) 1174

Duty of Fair Referral – Duty of Fair Representation – Order for Productions – The employee brought an application alleging a breach of the union's duty of fair representation and its duty of fair referral – The Board held that while the applicant alleged a number of misdeeds on the part of union officials in the course of internal union proceedings involving him, none were alleged in the context of his employment relationship as a bargaining unit employee with an employer bound to the collective agreement – As a result, the Board dismissed the s. 74 application for failure to disclose a *prima facie* case – The Board held that the s. 75 application should proceed because the applicant had been suspended as a union member thereby removing him from the hiring hall list – Since the applicant suggested that his suspension was improperly motivated, an explanation will be required from the union regarding its motivations and thought processes for having suspended the applicant – On this point, as the Board stated in *Danillo Buttazzoni*, [2004] OLRB Rep. May/June 499, it would not entertain arguments about the procedural aspects of, or adherence to, a trade union's constitution by the union's decision-makers who determined the expulsion or suspension of the member – The Board also ordered that the union provide the applicant with copies of its work assignment records in order to confirm or deny his claim that more junior employees were given work assignments while he was bypassed – Matter continues

DUDLEY WRIGHT; RE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, LOCAL 873 .... (Sept./Oct.) 862

Duty of Fair Referral – Unfair Labour Practice – The employee claimed that the union had breached its duty of fair referral by refusing to readmit him after he had resigned his membership – He alleged that, as a result of this refusal, he was unable to obtain employment under the collective agreements by which Local 675 is bound, including its province-wide ICI agreement – The Board refused to adopt an expansive interpretation of

s. 75, which would extend the duty owed by unions beyond the "selection, referral and assignment of persons for employment," to encompass all union decisions, including a decision to not admit someone to membership – The Board noted that this was in keeping with its interpretation of s. 75 over the last 25 years – The Board distinguished the case of a person seeking admission to membership from one of someone who had been expelled – In the case of a person expelled who alleges a breach of s. 75, the duty under that provision is still owed by the union to the point of the expulsion – A person who is not actually a member of the union, however, has no relationship with the union, as they are neither bargaining unit employees nor persons referred to the union by an employer to be name hired – The union cannot owe a duty under s. 75 to a person with whom it has no relationship – Application dismissed

PAUL L. STEWART; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, DRYWALL ACOUSTIC LATHING AND INSULATION, LOCAL 675 ....(Jul./Aug.) 793

Duty of Fair Representation – Collective Agreement – Trade Union – The six applicants, members of the respondent trade union, CHCW, had filed lay off grievances that were scheduled for arbitration – During a displacement campaign by OPSEU, the members were advised that their grievances would be withdrawn should the members vote for OPSEU – OPSEU was successful and, prior to OPSEU providing a letter to CHCW that OPSEU would act as agent and incur all costs for the grievances, CHCW withdrew the grievances – The Board first found that CHCW's campaign statement--that it would withdraw the grievances--was not a breach of s. 76, since its actions were a reasonable interpretation of its obligations on the loss of representation rights – The Board also found that CHCW's withdrawal of the grievances, prior to hearing from OPSEU, did not breach s. 74 since nothing required a defeated incumbent union to "keep alive" outstanding grievances against the possibility that the incoming union might seek its permission to act as agent with proper cost protection – Accordingly the Board found, in the absence of any obligation by OPSEU to request agency for carriage of the grievances or any reasonable expectation that it would do so, that the withdrawal of the grievances accorded with CHCW's institutional interests and were not a breach of the Act – Finally, once CHCW received OPSEU's letter, the Board found CHCW's failure to take any action to retract its withdrawal could not be a breach of its duty since it could no longer unilaterally accomplish this – Application dismissed

CORPORATION OF THE COUNTY OF GREY OPERATING AS GREY GABLES COUNTY HOME FOR THE AGED, THE; RE PEARL LONG ET AL; RE CANADIAN HEALTH CARE WORKERS UNION ....(May/June) 530

Duty of Fair Representation – Delay – Judicial Review – The applicant brought a motion before a single judge of the Divisional Court to overturn the Court's Registrar's dismissal of the application for judicial review for failure to perfect in a timely way (the applicant had lost a duty of fair representation complaint at the Board, because of undue delay) – The judge found no compelling reasons to vary the Registrar's ruling and confirmed there was nothing patently unreasonable about the Board's decision – Motion dismissed

KOSTANTINOS IAONNIDIS; RE ATU LOCAL 1572, CORPORATION OF THE CITY OF MISSISSAUGA, TRANSPORTATION AND WORKS DEPARTMENT, TRANSIT DIVISION ....(Jan./Feb.) 291

Duty of Fair Representation – Duty of Fair Referral – Order for Productions – The employee brought an application alleging a breach of the union's duty of fair representation and its duty of fair referral – The Board held that while the applicant alleged a number of misdeeds on the part of union officials in the course of internal union proceedings involving him, none were alleged in the context of his employment relationship as a bargaining unit employee with an employer bound to the collective agreement – As a result, the Board dismissed the s. 74 application for failure to disclose a *prima facie* case – The Board held that the s. 75 application should proceed because the applicant had been suspended as a union member thereby removing him from the hiring hall list – Since the applicant suggested that his suspension was improperly motivated, an explanation will be required from the union regarding its motivations and thought processes for having suspended the applicant – On this point, as the Board stated in *Danillo Buttazzoni*, [2004] OLRB Rep. May/June 499, it would not entertain arguments about the procedural aspects of, or adherence to, a trade union's constitution by the union's decision-makers who determined the expulsion or suspension of the member – The Board also ordered that the union provide the applicant with copies of its work assignment records in order to confirm or deny his claim that more junior employees were given work assignments while he was bypassed – Matter continues

DUDLEY WRIGHT; RE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, LOCAL 873..(Sept./Oct.) 862

Duty of Fair Representation – Duty to Bargain in Good Faith – Unfair Labour Practice – These three applications concern (1) an unfair labour practice complaint brought by the union alleging the employer's failure to bargain in good faith; (2) an unfair labour practice complaint launched by individual employees against the employer; and (3) a complaint by the same employees that the trade union had not represented them fairly – Shortly after the union was certified, the employer announced the closure of its transportation division and the permanent lay-off of all the bargaining unit members – The union and employer negotiated, and the employees ratified, a closure agreement rather than a collective agreement – The Board found that the union failed to make out a *prima facie* case of a violation of s. 17 because the parties had reached an "agreement" that was enforceable by way of arbitration – The Board further found that individual employees have no standing to allege violations of s. 17 and 86, and have limited standing (not applicable in the present case) to complain about violations of s. 70 – Allegations of a violation of s. 72 were allowed to proceed, with a direction to the employees for further particulars – Finally, the alleged violation of s. 74 was allowed to proceed as well (in light of the arbitrability of the closure agreement), once again with a direction for further particulars – Matter proceeds

READY BAKE FOODS INC.; RE UNITED FOOD & COMMERCIAL WORKERS CANADA LOCAL 175; RE BRIAN LORENTZ ET AL ....(Jan./Feb.) 166

Duty of Fair Representation – Evidence – Judicial Review – The standard of review with respect to the merits of the Board's decision was patent unreasonableness – The court found that the Board's decision on the merits and in its reconsideration were entirely reasonable: the Board concluded the union could not continue to represent the applicant because of his antagonistic and uncooperative attitude (which was unwarranted); and there was ample evidence on which to base that conclusion – The court also found no denial of procedural fairness in the manner in which the Board proceeded by consultation – A motion to introduce fresh evidence was also dismissed – Application dismissed

STEPHANE VERREAULT; RE UNITED ASSOCIATION OF JOURNEYPERSONS AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE US AND CANADA, TEAMSTERS LOCAL UNION 419; RE OLRB ....(May/June) 697

Duty of Fair Representation – Health and Safety – Practice and Procedure – The Board found that these two applications arose from similar facts at the workplace, and directed that they be heard together; further, the Board held that rulings made in the first application that pertain to the same facts or legal issues would be binding on the parties in the second application – The applicant alleged that he raised serious health and safety concerns about his workplace with his employer, his union and the Ministry of Labour, and that the responses and results arising from his complaints were unsatisfactory – The Board found that the union had acted properly: it participated in his reassignment when he invoked a work refusal; it took an active role in the Ministry investigations of air quality in the workplace, and it filed a grievance on the applicant's behalf when he was denied short-term assistance – Application dismissed – Second matter to be scheduled for hearing

JEREMY WOODCOCK; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ON BEHALF OF ITS LOCAL 6571; RE RONALD GOODCHILD; RE GERDAU AMERISTEEL INC. .... (Mar./Apr.) 390

Duty of Fair Representation – Judicial Review – Leave to Appeal Refused

STEPHANE VERREAULT; RE OLRB; RE TEAMSTERS LOCAL UNION 419, UA LOCAL 787 .... (Nov./Dec.) 1210

Duty of Fair Representation – Judicial Review – Reconsideration – The Board exercised its discretion not to inquire into a duty of fair representation complaint when it ascertained the complaint was virtually identical to an earlier application that the applicant had withdrawn – The Board subsequently dismissed the applicant's request for reconsideration – On judicial review, the Court found the Board had acted reasonably and within its jurisdiction – Application for judicial review dismissed

SCADUTO; RE UFCW .... (Sept./Oct.) 981

Duty of Fair Representation – The applicant complained that his trade union (OSSTF) violated s. 74 of the Act when it failed to provide him with a lawyer in his disciplinary proceeding before the Ontario College of Teachers – The Board held that a union's duty of fair representation is restricted to those matters arising out of the collective agreement, where the union enjoys exclusive bargaining rights *vis à vis* the employer – A hearing before the applicant's professional disciplinary body is not a matter that involves either the union or the employer; it is strictly between the individual and his/her governing body – Even when the union elects to represent the individual in such a proceeding, the union's conduct does not fall under the Board's scrutiny pursuant to s. 74 – Application dismissed

GILBERT MCINTYRE; RE OSSTF, DISTRICT 12....................................... (Mar./Apr.) 360

Duty to Bargain in Good Faith – Collective Bargaining – Construction Industry – Intervenors – Parties – Unfair Labour Practice – Three of five constituent member associations of PEBAL filed a complaint alleging the LEBA together with the other two constituent

members of PEBAL breached s. 17 of the Act – The applicants allege that LEBA and the two other constituent members, by entering into agreements extending the scope of their appendices and subcontracting provisions, have forced a recognition issue to impasse, since PEBAL cannot adopt an agreement entered into by some members that has a direct negative impact on its other members – The Board found that just as there is no duty to bargain in good faith owed to employees, there is no duty owed to the constituent members of PEBAL – The Board further noted that while it is charged with determining the applications or complaints that are filed with it, the Board must be satisfied the applicants do not just have an interest in the matter, but have the legal right to proceed with the complaint – Here the Board found since there is no duty on LEBA to bargain in good faith with the constituent members of PEBAL, the applicants do not have the legal right to assert that LEBA violated the duty to bargain in good faith owed to PEBAL – Finally the Board characterized this matter as one of a complaint about the manner in which two of the five constituent members of PEBAL have dealt with the other three members (and how LEBA has taken advantage of this schism), and not as one encompassed by s. 17 of the Act – Application dismissed

ONTARIO MASONRY CONTRACTORS ASSOCIATION; RE CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF ONTARIO; RE SEALANT AND WATERPROOFING ASSOCIATION; RE INDUSTRIAL CONTRACTORS ASSOCIATION OF CANADA; RE CONCRETE FLOOR CONTRACTORS ASSOCIATION OF ONTARIO..(May/June) 600

Duty to Bargain in Good Faith – Duty of Fair Representation – Unfair Labour Practice – These three applications concern (1) an unfair labour practice complaint brought by the union alleging the employer's failure to bargain in good faith; (2) an unfair labour practice complaint launched by individual employees against the employer; and (3) a complaint by the same employees that the trade union had not represented them fairly – Shortly after the union was certified, the employer announced the closure of its transportation division and the permanent lay-off of all the bargaining unit members – The union and employer negotiated, and the employees ratified, a closure agreement rather than a collective agreement – The Board found that the union failed to make out a *prima facie* case of a violation of s. 17 because the parties had reached an "agreement" that was enforceable by way of arbitration – The Board further found that individual employees have no standing to allege violations of s. 17 and 86, and have limited standing (not applicable in the present case) to complain about violations of s. 70 – Allegations of a violation of s. 72 were allowed to proceed, with a direction to the employees for further particulars – Finally, the alleged violation of s. 74 was allowed to proceed as well (in light of the arbitrability of the closure agreement), once again with a direction for further particulars – Matter proceeds

READY BAKE FOODS INC.; RE UNITED FOOD & COMMERCIAL WORKERS CANADA LOCAL 175; RE BRIAN LORENTZ ET AL ....(Jan./Feb.) 166

Employee – Bargaining Unit – Certification – Conflict of Interest – The union applied for and was successful in a representation vote for a bargaining unit of security guards in the gaming area of Georgian Downs, a horse racetrack – The employer and the racetrack argued that the bargaining unit could not be appropriate because the guards monitored other employees, some of whom were in a different bargaining unit held by the same union – The Board examined the duties of the guards, their surveillance and security functions, their interaction with other employees, as well as the union's activities, bargaining rights and constitution, and found there would be no conflict or compromise in the guards' employment duties and their union responsibilities – Certification granted, subject to gaming registration

OLG SLOTS AT GEORGIAN DOWNS; RE PUBLIC SERVICE ALLIANCE OF CANADA .... (Mar./Apr.) 397

Employee – Certification – Construction Industry – Membership Evidence – Practice and Procedure – Reconsideration – In a request for reconsideration of a successful certification application where the employer had provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis – The handwriting expert determined that it was highly probable that the person who signed the affidavit had also earlier signed the membership evidence – The responding party submitted that the employee in question admitted that the signature on the membership card was his – Request for reconsideration withdrawn

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.. (Mar./Apr.) 396

Employee – Bar – Bargaining Unit – Certification – This application for certification was filed within a year of an earlier application against the same employer – Subsequent to the dismissal of the first application the employer moved its operations from Brampton to Milton (which area was not covered by the bargaining unit proposed in the first application) – Ten employees moved from Brampton to Milton and performed the same jobs – The Board found that the word "position" must be interpreted in context to avoid a result that is inconsistent with sound labour relations or the purposes of the Act – The Board found that the position of an employee is not the same unless it is with the same employer and in a geographic location covered by the scope clause of the original application – Therefore the ten employees transferred to Milton were in different positions than they held in Brampton, and they would not have been in the bargaining unit proposed in the current application had they occupied their original position – Given that the criteria set out in s. 10(3.1) had been met, the Board exercised its discretion to consider the current application since only 10 of the 30 employees at Milton had their wishes for unionization tested within the one year period and more than six months had elapsed between the two applications – Certificate issued

EXCEL TECHNOLOGIES LIMITED; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS.. (Mar./Apr.) 353

Employee – Bargaining Unit – Certification – Construction Industry – The Board was asked to determine whether the employees of the responding party in this application for certification were exempt from the Act pursuant to s. 3(c) because the employees were "employed in horticulture" and the "primary business" of the employer is agriculture or horticulture – The responding party was subcontracted by a road construction contractor to perform landscaping work adjacent to the construction of a new roadway – The Board held that spreading topsoil in preparation for the installation of sod and hydro seeding as part of a road building project was horticulture and work in the construction industry – However, an examination of the employer's primary business revealed that a significant majority of its business was either landscaping or operation of a sod farm, and therefore fell within the definition of agriculture or horticulture – Application dismissed

CHRIS TRANBERG & SON LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.. (Mar./Apr.) 338

Employee – Bargaining Unit – Certification – The union sought to certify all registered graduate students employed pursuant to a Graduate Research Assistantship (GRA) – GRAs are a form of funding provided to some graduate students – The employer argued that GRA work had educational value and was no different than thesis work, whereas the union argued that GRA work, not directed to a graduate student's own thesis, provides value to Western and is employment – The Board found that there was no difference between the activities and tasks a graduate student normally undertakes for GRA work and what they do when performing other graduate studies related work – Finally, the Board noted that while graduate students may be employed by Western with respect to the performance of some work, GRA work does not create an employment relationship – Bargaining unit was not appropriate – Matter continues

UNIVERSITY OF WESTERN ONTARIO; RE PUBLIC SERVICE ALLIANCE OF CANADA ....(Nov./Dec.) 1151

Employee – Certification – Construction Industry – Practice and Procedure – Status – The employer sought to remove two names from its list of employees at the Regional Certification meeting for one of two proffered reasons: either because they were performing work of a different craft or they were independent contractors – The Board refused to allow the employer to alter its list – The prejudice to the union in having to attempt to ascertain what work the employees were doing on an ordinary day two months earlier was significant and perhaps impossible to overcome – Secondly, the facts pleaded by the employer to establish independent contractor status were equivocal and therefore also prejudicial – Motion dismissed – Matter continues

MELANDI DRYWALL SYSTEM INC.; RE IUPAT, LOCAL 1891...............(Nov./Dec.) 1075

Employee – Certification – Status – The Board examined the position of "inventory clerk" or "auditor" for purposes of certification of a clerical unit of the employer's employees – The parties had earlier agreed to alter the recognition clause of the employer's production unit because the auditors were supervisors within the meaning of the bargaining unit description – In the current application the union sought to have the auditors excluded either because they were supervisors or because they performed managerial functions within the meaning of s. 1(3) of the Act – The Board held that since the parties had agreed the auditors exercised supervisory functions so as to be excluded from the production unit, and there was no material change in their status prior to the instant application, they remained supervisors within the meaning of the clerical bargaining unit – Status determined

PENSKE LOGISTICS; RE TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 880 ....(May/June) 617

Employee – *Colleges Collective Bargaining Act* – Status – OPSEU asked the Board to determine whether four continuing education instructors were employees under the CCBA and, if so, whether they fall within the academic bargaining unit – St. Lawrence brought a motion seeking to have the Board defer the issue to arbitration – The Board held that its powers under s. 81 of CCBA were similar to the jurisdiction it enjoyed regarding employee status disputes under s. 114(2) of the LRA – The parties agreed, and the Board accepted, that arbitrators had the authority to make the same determinations – The Board was not satisfied that there was any overriding public policy or remedial opportunity that made it more appropriate than arbitration for a determination of the issue – Application dismissed

ST. LAWRENCE COLLEGE; RE OPSEU .... (Sept./Oct.) 951

Employee – Dependent Contractor – Employment Standards – The applicant sought a review of a refusal to issue an Order to Pay arguing that he was an employee of the company, not a subcontractor –The Board found the commercial subcontract agreement between the applicant and the employer was not proof of their true relationship: all the applicant brought to the relationship was his labour as a janitor; he engaged in no promotion to secure the job; he had virtually no say in setting the terms and conditions (including the non-negotiable monthly pay) set out in the agreement; and he did not provide his own equipment or supplies – In distinguishing *Clara-Ester Cleaning Services* the Board found the Act was intended to protect a person such as the applicant—one who lacked bargaining power and was economically dependent upon the employer – The Board held that the applicant was an employee as defined by the *Employment Standards Act* – Application allowed

SUPERIOR-1 CLEANING SERVICES LTD.; RE HOSSEIN MOHAMMADI and THE DIRECTOR OF EMPLOYMENT STANDARDS .... (Nov./Dec.) 1098

Employee – Employment Standards – The employer sought review of an employment standards officer's order to pay wages to two employees – The employer argued that the individuals were independent contractors and not employees, and therefore not subject to the Act – The Board held that the employer, a construction contracting business, engaged individuals to perform work on a project by project basis: the company's director found the work, estimated the cost of the job, estimated the price, then hired the individuals to work on the projects; payments were made every two weeks or at the end of the job; individuals were not free to assign work to others – The Board found that an employment relationship existed between the parties, and that poor performance was no reason to deny the employees their wages – Application dismissed

ILARIS CORPORATION; RE ARTEM GADZEVYCH; RE MIKHAIL KATAYEV; RE VICTOR CHORIKOV; RE TATIANA CHLYGINA AND DIRECTOR OF EMPLOYMENT STANDARDS .... (May/June) 558

Employee – Interference with Trade Union – Remedies – Unfair Labour Practice – The collective agreement between the University and YUSA included eligibility to participate in a pension plan and post-retirement benefits – The University, arguing retirees were not employees, refused to provide YUSA with the names and addresses of persons who had retired from the University and had been employed in the bargaining unit represented by YUSA immediately prior to their retirement – The Board did not find it necessary to determine whether retirees were "employees" for at least some purposes of the Act – The Board found as long as it was arguable that YUSA had an obligation or the right to pursue a grievance respecting the continued provision of benefits to retirees in accordance with the collective agreement provisions, the denial of information to it amounted to an interference with its administration, contrary to section 70 – Declaration and direction that information be provided

YORK UNIVERSITY; RE YORK UNIVERSITY STAFF ASSOCIATION....(May/June) 659

Employer – Certification – Construction Industry – Practice and Procedure – Related Employer – Timeliness – The Board found nothing wrong with the application naming three possible employers as responding parties: the applicant specifically referenced subsection 1(4) and asked that the certificate name all three entities – The responding party filed its response five days late but asked the Board to exercise its discretion to

accept the late-filed information in accordance with the ruling of the Divisional Court in *Maystar* (see [2007] OLRB Rep. March/April 459) – The Board examined possible criteria for the exercise of discretion: the nature of certification applications and the need for speed in their determination; the reasons for the late filing; prejudice to the applicant – The Board finds that prejudice is present in every case, and will be the same in every case – In the circumstances of this case, the Board does not exercise its discretion to accept the late-filed information – The applicant delivered its materials to three fax machines for the three employers; personal delivery is not a requirement of the Act or the Board's Rules – Time extension allowed for response to related employer allegations – Matter continues

REIDS UPTOWN HOMES, REIDCO NORTH LTD., S.R. PROPERTIES INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL ....(May/June) 633

Employer – Certification – Construction Industry – The Board had to determine the identity of the employer in this application for certification – Wallworks obtained a contract to install fabric wall panels - ACTT bid on the installation of the panels at the behest of Wallworks, but was not awarded the contract because the work had to be performed by a union sub-contractor – Wallworks retained the services of Fabric Interior, who hired T, the president of ACTT to train and supervise the work – T invoiced Fabric on an hourly basis for his time, and for the ACTT equipment used on the project – T contacted the hiring hall and supervised the employees for the duration of the project – Employee cheques were paid by Fabric, and ROEs were issued by Wallworks - The Board found, applying the criteria from *York Condominium*, that the fundamental control over the employees was held by ACTT, so it was their employer – Certification granted

ACTT INSTALLATION LTD.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93 .... (Mar./Apr.) 300

Employer Initiation – Bargaining Rights – Construction Industry – Termination – The employer was certified in both the ICI and non-ICI sectors of the construction industry – The employer acknowledged that employees may have heard him express his disappointment with the union – Two applications for the termination of bargaining rights were filed by an employee – The first was filed 5 months after the union was certified; the second, exactly 6 months after the union was certified – The union alleged that both applications were influenced by the employer under section 63(16) of the Act – The Board noted, relying on *Tenaquip Ltd.* that circumstantial evidence may be sufficient to lead to an inference of improper employer involvement – The Board found that the employer influenced the first application for the termination of bargaining rights because the employer: 1) expressed his disappointment with the union to its employees; 2) informed the employees that a decertification application could be filed; 3) signed the petition filed with the first application; and 4) may have even been involved in circulating the petition – The Board also considered the fact that the employees were paid for the time they took to mail the application – The Board further found that the employer influenced the second application for the termination of bargaining rights because the employee could not explain: 1) how the application and the second petition were drafted; 2) how the application was sent to the union and to the Board; and 3) the reason the application was sent so close to the first and untimely application – Applications dismissed

SWING N SCAFF INC.; RE CARON, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93 ....(Nov./Dec.) 1106

Employer Initiation – Bargaining Rights – Practice and Procedure – Termination – The employer argued that the trade union should be precluded from alleging a violation of s. 63(16) because it failed to particularize the impugned conduct in a timely way – The Board upheld the employer's position, stating that the union must engage in due diligence to articulate its position as promptly as possible, in accordance with the Board's Rules – This failure of due diligence (a delay of over three months) caused the Board to deny the union the opportunity to lead evidence relating to employer initiation – Matter continues

WALLS.COM INC.; RE DARREN CATES; RE THE CARPENTER'S DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTER'S AND JOINERS OF AMERICA AND ITS LOCAL 494 AND CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL AND GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL & ALLIED WORKERS AND UNITED BROTHERHOOD OF CARPENTER'S AND JOINTERS OF AMERICA; AND THE FOLLOWING LOCAL UNIONS; 18, 27, 93, 249, 397, 446, 494, 675, 785, 1256, 1669, 1946, 1988, 2041, 2222 AND 2486 ....(Nov./Dec.) 1179

Employment Standards – Abuse of Process – Practice and Procedure – In this employee application for review, the Board had issued earlier decisions describing the applicant's inappropriate, disrespectful and disruptive behaviour – Ultimately the Board was forced to cut short a hearing day because of the employee's conduct, and seek submissions from the parties as to how to proceed – The employer argued that to continue would be an abuse of process, the applicant had not pleaded a *prima facie* case or, alternatively, the applicant should provide a medical assessment of his ability to proceed – The applicant sought the Vice-Chair's recusal, an order from the Board admonishing employer counsel's behaviour, and a broader investigation into his employment and discharge (including reprisal) – The Board refused to step down, confirmed that employer counsel's conduct had been courteous and restrained, and held that the breadth of the issues before it already encompassed the remedies the applicant was seeking – The Board terminated the hearing and dismissed the application because of the applicant's conduct

NOVAFLOW SYSTEMS INC.; RE OMER A. EL SAYED AND DIRECTOR OF EMPLOYMENT STANDARDS ....(Jan./Feb.) 130

Employment Standards – Dependent Contractor – Employee – The applicant sought a review of a refusal to issue an Order to Pay arguing that he was an employee of the company, not a subcontractor –The Board found the commercial subcontract agreement between the applicant and the employer was not proof of their true relationship: all the applicant brought to the relationship was his labour as a janitor; he engaged in no promotion to secure the job; he had virtually no say in setting the terms and conditions (including the non-negotiable monthly pay) set out in the agreement; and he did not provide his own equipment or supplies – In distinguishing *Clara-Ester Cleaning Services* the Board found the Act was intended to protect a person such as the applicant—one who lacked bargaining power and was economically dependent upon the employer – The Board held that the applicant was an employee as defined by the *Employment Standards Act* – Application allowed

SUPERIOR-1 CLEANING SERVICES LTD.; RE HOSSEIN MOHAMMADI and THE DIRECTOR OF EMPLOYMENT STANDARDS..(Nov./Dec.) 1098

Employment Standards – Discharge – The applicant asserted that her pregnancy played a role in the employer's decision to terminate her – The onus of establishing that there was no contravention of section 74 of the Act lies on the employer – The Board was satisfied that the employer fulfilled its burden; the Board drew no adverse inference from the employer's failure to call the employer's spouse when the applicant had not asserted in her application or at the hearing that the spouse was aware of the pregnancy – Application dismissed

RAJAE ELALAMI; RE DR. EMAD HANNA AND DIRECTOR OF EMPLOYMENT STANDARDS ....(May/June) 629

Employment Standards – Employee – The employer sought review of an employment standards officer's order to pay wages to two employees – The employer argued that the individuals were independent contractors and not employees, and therefore not subject to the Act – The Board held that the employer, a construction contracting business, engaged individuals to perform work on a project by project basis: the company's director found the work, estimated the cost of the job, estimated the price, then hired the individuals to work on the projects; payments were made every two weeks or at the end of the job; individuals were not free to assign work to others – The Board found that an employment relationship existed between the parties, and that poor performance was no reason to deny the employees their wages – Application dismissed

ILARIS CORPORATION; RE ARTEM GADZEVYCH; RE MIKHAIL KATAYEV; RE VICTOR CHORIKOV; RE TATIANA CHLYGINA AND DIRECTOR OF EMPLOYMENT STANDARDS ....(May/June) 558

Employment Standards – Fraud – Settlement – Twenty-three claimants had reached a settlement with one of three directors of SLMsoft Inc. – A term of the settlement released all three directors from any obligations, upon receipt of the entire payment by the director who signed the settlement – The payment was never made – The Board determined that the term of the settlement forfeiting the employees' entitlement to seek relief from directors only arose upon payment of the money – The Board also found that a director's purported letter of resignation was fraudulent and that it induced the claimants to enter into the settlement – Pursuant to s. 120(5) the claimants were entitled to an order voiding the settlement agreement on the basis of fraud – Matter re-listed for Hearing

SLM SOFT INC.; RE GOVIN MISIR, A DIRECTOR; RE EDDIE LAW, A DIRECTOR; DR. BUDHENDRANAUTH DOOBAY, A DIRECTOR; RE MURAT TAYFUN CAN ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS ....(Mar./Apr.) 422

Employment Standards – Health and Safety – Reprisal – Work Refusal – The employee alleged he was dismissed because he had raised concerns with his employer regarding overtime pay and the safety of a van used in the course of his employment, contrary to s. 74 of the ESA and s. 50 of the OHSA, respectively – The Board held that there was no requirement under s. 50 of the OHSA for the employee to first comply with the Act *and then* seek its enforcement; rather, it is sufficient that the worker acted in compliance with the Act *or* sought its enforcement *or* gave evidence in a proceeding in relation to the enforcement of the Act – The Board held that there was no evidentiary basis for concluding that the employee had raised the subject of the safety of the van with his employer – The evidence revealed that the employee and employer engaged in an argument regarding the effect a diesel leak in the van would have on the employee's license, and this led to his discharge – No issue of overtime was raised during the argument – Application for review of ESO's decision not to issue an order finding a breach of s. 74 of the ESA dismissed – Employer found not to be in breach of s. 50(1) of the OHSA – Matter referred to Field Services to resolve Board's exercise of discretion under s. 50(7) of the OHSA – Matter continues

TRI-GREEN CONSTRUCTION INC.; RE DARRYL HICKEY ....(Jul./Aug.) 831

Employment Standards – Judicial Review – Related Employer – Termination – Three companies appealed the ESO's order that they owed termination and severance pay to nearly 100 employees as a result of a finding that they were related businesses to "C," a bankrupt company, and should be treated as one employer pursuant to s. 4 of the Act – The Board found that s. 4 requires a finding that both subsections (a) and (b) be answered positively, and that there must be a causal connection between the "relatedness" of the companies and the insolvency before there is a declaration of one employer under the section – The Board allowed the application – The employees applied for judicial review – The court held that the applicable standard of review was reasonableness, as per s. 119(14) of the Act – The court affirmed the Board's interpretation of the test under s. 4 that there must be some connection between the relationship [between the companies] and the insolvency - The Board fully considered whether there was any *intent* to defeat the purposes of the Act when it considered how the owner came to acquire company "C" and that its status as a company separate from the others was at the insistence of the financing bank, not the principals – The Board also clearly considered the *effect* of the corporate structure in determining whether the purposes of the ESA had been defeated, and properly concluded that, rather than contributing to the insolvency, the other companies had "propped up" company "C" - There was sufficient evidence for the Board to conclude that the owner had not made a bankruptcy proposal "designed for rejection" – The Board did not err in considering cases decided under the former s. 12, as the issue of intent to defeat the ESA is still relevant under the current provision – The Board properly considered the conduct of the creditors in bringing about the bankruptcy in considering whether there was any impropriety connected with the insolvency, and whether the principals made reasonable efforts to avoid it – It was reasonable for the Board to conclude that the resources invested in a 'phoenix' company were not sufficient to keep company "C" operating – The Board's decision was reasonable on the facts before it – Application for judicial review dismissed

ABDURAHMAN ABDOULRAB ET AL; RE NOVAQUEST FINISHING INC., CATELECTRIC INC., 4064186 CANADA INC. AND THE ONTARIO LABOUR RELATIONS BOARD ....(Jul./Aug.) 842

Employment Standards – Judicial Review – The Board found that the employee was not guilty of wilful misconduct, disobedience or wilful neglect of duty – After a change of supervisors which brought about a change in company policy, the employee believed he still could sell used, non-warranty catalytic converters for his own benefit – The Board found his discharge was caused by a misunderstanding, granted the employee's appeal, and ordered the employer to pay termination pay – On judicial review the Court found the Board was entitled to come to the conclusion on the evidence – Application dismissed

ONTARIO LIMITED o/a OAKVILLE HONDA; RE CREYOS BATCHELOR AND OLRB..(Nov./Dec.) 1210

Employment Standards – Premier Fitness challenged an order requiring it to pay holiday pay to two personal trainers, arguing they were elect-to-work employees and exempt from such payment pursuant to s. 9(k) of O/Reg. 285/01 – The Board found that the employer scheduled the trainers for work beyond their declared availability, and expected them to meet the employer's needs – The elect-to-work status was illusory – Applications dismissed; orders to pay affirmed

PREMIER FITNESS; RE JANIS STRATHDEE; RE ELAINE FLETCHER AND DIRECTOR OF EMPLOYMENT STANDARDS..(May/June) 627

Employment Standards – Reconsideration – Timeliness – The employer sought reconsideration of a Board order requiring it to pay the employee $10,000 in unpaid wages – Prior to the original hearing, the employer advised the Board that it was insolvent but it did not attend the hearing or present proof of insolvency – On reconsideration, the employer argued that it did not attend the hearing because of "off the record" advice it had received from the LRO – The Board found that even if the LRO had provided unofficial and erroneous advice, the employer had received the Board's Information Bulletin No. 24 and a Notice of Hearing with information regarding hearing attendance (and the consequences of non-attendance) – The Board also found that any representations by the LRO would have been ambiguous or unqualified to engage legitimate expectations – In addition, the Board held that the Request for Reconsideration was untimely as it was filed more than 70 days after the release of the decision – Ignorance of the Board's procedure is not a compelling reason for delay – Request for reconsideration dismissed

JOE BONE'S GRILL INC.; RE GIUSEPPE F. TEDESCO AND DIRECTOR OF EMPLOYMENT STANDARDS..(Nov./Dec.) 1065

Employment Standards – Settlement – The employee (one of three co-defendants in a civil action by the employer alleging breach of contract, conspiracy and theft) signed an affidavit in support of a motion in the civil action referring to the fact that the employer had stopped payment on her last pay cheque – The employee's *ESA* complaint was known to the parties when the lawsuit was settled and all three defendants entered into a standard release "from any and all claims" with respect to the court file – The employer submitted that the employee was barred from filing the claim pursuant to s. 98 and because she had already received a benefit under the settlement – First the Board found that an interlocutory motion by a defendant in a civil action is not the commencement of a civil proceeding and accordingly does not bar her claim under s. 98 – Second, the release did not specifically reference the *ESA*, and it easily could have, given the parties' knowledge of the claim – Accordingly, the release was no impediment to the employee's claim – Application dismissed, order to pay confirmed

TOTAL DEBT FREEDOM INC.; RE REBECCA DAVIS AND DIRECTOR OF EMPLOYMENT STANDARDS..(Nov./Dec.) 1147

Employment Standards – Statutory Holiday – The employer sought a review of an order to comply with the holiday pay provisions of the *Employment Standards Act, 2000* – The employer argued that the loss of a substitute day off for public holidays which fall on a day that is not ordinarily a working day for the employee was compensated for in this case by greater rights or benefits in the employment contract – The Board agreed that the employer's plan for public holidays provided a greater right or benefit, as contemplated by s. 5(2), and therefore it did not need to determine whether the plan was consistent with the Act – The Board noted that the claimant received 10 public holidays as opposed to the 8 provided for under the Act – The Board noted in addition that, for a number of those holidays, the claimant received 12 hours of holiday pay, as opposed to the 8.4 hours he would be entitled to under the Act – It was uncontested that the employer's maintenance operation was a continuous operation, and therefore the employer could require employees to work on any public holiday that would ordinarily be a working day under s. 28 of the Act – The employer in this case, however, gave its maintenance employees the choice of whether or not to work on a public holiday that was ordinarily a working day – The Board held that when both the employee's monetary entitlement and time off were considered, the employer's plan provided a greater right or benefit, and the choice to work public holidays in particular offset any lost holiday time – Appeal allowed

BOWATER CANADIAN FOREST PRODUCTS INC.; RE WAYNE LEARNING AND DIRECTOR OF EMPLOYMENT STANDARDS ....(Jul./Aug.) 713

Employment Standards – The applicant claimed severance pay from Brookfield Lepage, a company providing property management services, after it was replaced by Profac – The applicant was hired by Profac within 13 weeks of the replacement – As both Profac and Brookfield Lepage were building services providers pursuant to the ESA, s. 10 applied – Therefore the applicant's employment with Brookfield was deemed not to have been terminated and her employment with Profac will include her length of employment with Brookfield for the purposes of the ESA – Application dismissed

BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITY MANAGEMENT SERVICES LTD.; RE SNC-LAVALIN PROFAC INC.; RE CAROL BETTS AND DIRECTOR OF EMPLOYMENT STANDARDS .... (Mar./Apr.) 320

Employment Standards – The applicant sought review of a refusal to award him overtime pay from his employer, for work carried out in the U.S. – The employer argued that the work in the U.S was not a continuation of work performed in Ontario, and accordingly was not work covered by s.3 of the Act – The Board found that the applicant's work in Michigan was indeed a continuation of work performed in Ontario, because the applicant transported materials from Ontario to the U.S job site and then assisted in the installation of those materials in the U.S. – Application allowed; overtime pay awarded (This decision came to the editors' attention subsequent to the preparation of the May 2007 *Highlights*)

JAMES WAY CONSTRUCTION INC.; RE TONY SHEARING AND DIRECTOR OF EMPLOYMENT STANDARDS...(May/June) 572

Employment Standards – The employee appealed a decision of an employment standards officer not to award her termination pay and the amount of her last pay cheque - The Board found that the employee, a teenager working her first job, had wrongly entered a customer's bill payment but the conduct did not amount to wilful or deliberate misbehaviour to disentitle her to termination pay – The Board further found that the employer caused or coerced the employee to sign over her final pay cheque to it, constituting an unlawful deduction contrary to the Act – However, the Board found that the forty dollars cash the employer asked the employee to hand over from her wallet (under threat of legal action) during the termination meeting was not wages, accordingly, the Board was without jurisdiction to order the return of these funds – Application allowed

LINIS SALES INC. O/A CANADIAN TIRE AND DIRECTOR OF EMPLOYMENT STANDARDS; RE TANYA PHILLIPS ....(Nov./Dec.) 1071

Employment Standards – The employee claimed unpaid wages related to a "points" program introduced by the employer to encourage employees to sell certain products – Points could be redeemed by: (i) submitting medical claims to the employer for reimbursement on a dollar for dollar basis; (ii) using them to buy products from the store up to a maximum of $500 per time; or (iii) requesting a payout of points as wages, subject to statutory deductions – The employer took the position that the points did not constitute wages – The Board found that the point system had a specific monetary value that when taken as money was considered by the employer to be "wages" and subjected to statutory deductions – The Board rejected the argument that the employee's termination somehow negated her entitlement to redeem her earned points for money because: (i) the employee was never advised that termination of her employment would affect her entitlement to redeem her points for money, (ii) the employee's entitlement was defined and calculable as of the date of termination, and (iii) as the employer conceded, had the employee known that she was going to be terminated she could have cashed out her points one way or another prior to the date of her termination – Appeal Allowed; Order for wages issued

MILKYWAY PHAN; RE JCD HOLDINGS INC. O/A ENVIROTRENDS AND DIRECTOR OF EMPLOYMENT STANDARDS..(Sept./Oct.) 906

Employment Standards – The Employer applied for review of an Order to Pay – Subsection 116(1) of the *Employment Standards Act, 2000* requires, as a pre-requisite to filing the application, the payment of the amount owing to the Director of Employment Standards in trust or the provision of an irrevocable letter of credit acceptable to the Director – The Employer did not pay the full amount specified in the Order to Pay; rather, it withheld an amount in respect of statutory deductions – The Director contended that the amount withheld in respect of statutory deductions was excessive and sought an order from the Board to increase the total amount payable into trust to 70% of the total amount owing – The Board held that nothing in subsection 116(1) expressly allows for the payment into trust of anything less than the full amount of the Order to Pay, nor is there any prejudice to require an applicant to pay the full amount – The Employer was ordered to pay the full amount into trust in order to perfect the application

QUEBECOR WORLD INC.; RE CARLO BINETTI AND DIRECTOR OF EMPLOYMENT STANDARDS...(Jan./Feb.) 164

Employment Standards – The employer challenged an order for vacation and termination pay – The employer argued that any paid time off during the employment relationship could constitute paid vacation – The Board held that the *Employment Standards Act, 2000* does not provide that a day's wages paid in circumstances where the employee did not work necessarily constitutes a vacation – Further, the Board found that the employer immediately terminated the employee when she attempted to give two weeks' notice of her resignation – Application dismissed – Order adjusted to reflect full entitlement to termination pay

PETER J. DOUCET; RE ELIZABETH PITTUI AND DIRECTOR OF EMPLOYMENT STANDARDS...(May/June) 622

Employment Standards – The employer challenged the Notices of Contravention and Order to Pay issued in this matter, arguing that the employee had been offered and rejected reasonable alternative employment – The Board found that (a) an unequivocal offer was made in a series of memoranda addressed to employees, (b) the employee refused the offer by remaining silent and failing to take any action after receiving the offer, and (c) the alternative employment offered was reasonable – Training and proficiency requirements did not render the offer equivocal or mean that the employee could not likely perform the job offered – A period of training may be part of an offer of reasonable alternative employment – Any subjective expression of anxiety regarding the ability to perform the job offered was irrelevant if it had no objective basis – The employee was not entitled to rely on a medical condition to claim that the offer was unreasonable without having raised it first with the employer – Notices of Contravention rescinded and Order to Pay revoked

CASINO RAMA SERVICES INC.; RE WILLIS PAUL JR AND DIRECTOR OF EMPLOYMENT STANDARDS..(Jan./Feb.) 45

Employment Standards – Wilful Misconduct – The employee sought review of an ESO's refusal to issue an Order to Pay – The employer had a written policy which included health and safety requirements – A progressive disciplinary model was used to address an employee's failure to comply with the policy – Upon the employee's third disciplinary notice, he was advised that future violations of the policy could lead to termination – The employee violated the policy a fourth time by altering the scene of, and failing to report, an accident – Video surveillance evidence was considered – The Board assessed the employee's failure to comply with company policy and found his acts amounted to wilful misconduct – Application dismissed

SUPPLY CHAIN MANAGEMENT INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE MUSTAFA DAGINAWALA..(Sept./Oct.) 973

Employment Standards – Wilful Misconduct – The employer sought review of an ESO's decision that the employee was terminated for exercising his rights under the emergency leave provisions of the ESA – The employer had an Employee Handbook which included policies on absenteeism, lateness and discipline – The employee had three disciplinary infractions within 12 months for "blameworthy" absences – The employee was disciplined a fourth time for missing the first three hours of his shift – The Board found that the employee's fourth absence was because he had slept in and not because he was caring for his son – The Board held that the employee was not attempting to request or claim an emergency leave, or any other right under the ESA – The Board further held that the employee's fourth absence, while blameworthy, did not constitute wilful misconduct – Order for compensation was reduced to an order to pay termination and severance pay – Application allowed, in part

FAG AEROSPACE INC.; RE CHRIS NEAL AND DIRECTOR OF EMPLOYMENT STANDARDS ....(Sept./Oct.) 866

Essential Services Agreement – *Ambulance Services Collective Bargaining Act, 2001* –Interest Arbitration – Lock-Out – Strike – The union and the employer entered into an essential service agreement pursuant to the *ASCBA* where the number of employees who must work during a strike or lock-out were the exact same number that would be employed in the normal course – The employer's application asked the Board to find that "no meaningful lock-out can occur" in the circumstances and to direct binding arbitration to settle the collective agreement, while the union's application asked the Board to find that the employer had breached the essential services agreement – The Board found that for a lock-out (or strike) to be "meaningful" it must permit "the application of economic sanctions in order to further and support the collective bargaining process" – Since no employees would be locked out as a result of the essential service agreement, the Board concluded that the essential service agreement between the parties effectively precludes the employer from engaging in a lock-out – Employer's application allowed; final and binding interest arbitration directed; union's application dismissed

SUN PARLOUR EMERGENCY SERVICES INCORPORATED (ESSEX DIVISION); RE SEIU, LOCAL 1.ON .... (Mar./Apr.) 447

Estoppel – Construction Industry Grievance – The union filed two grievances alleging that Jacobs had performed work incorrectly under the General Presidents' Maintenance Agreement rather than under the provincial ICI agreement for construction, and its members were thereby deprived of higher wage rates – Jacobs argued that the work was properly characterized as maintenance or, in the alternative, the union should be estopped from its claim for relief, or the relief should be significantly reduced because of the late filing of the grievances – A majority of the Board found that work performed on existing equipment and machinery, including replacement of individual items, was maintenance – The changes undertaken by Jacobs did not involve enhancements or additions to a production process; there was no replacement of an entire system, and the change was not designed to increase production – On the other hand, the erection of a new blast-proof shelter and the installation of related cabling for the burner management system was construction; similarly the electrical work around the chloride mitigation tower, as well as the work associated with its new exchangers, was construction – Examining the employer's estoppel argument, the Board held that there is a distinction between an estoppel against the application of a provincial agreement and the estoppel against the application of a public statute: in specific circumstances, based on equity, it might be unconscionable for a particular beneficiary of rights under a provincial agreement to enforce those rights – In this case, the work contemplated by Petro-Canada and Jacobs was maintenance, the various trades were consulted and agreement was reached, and the work was performed without complaint by other than the applicant – The Board found that the union's representative had agreed that the projects would be conducted as maintenance, and that Jacobs had relied on this representation to its detriment –The estoppel argument succeeded - Grievances dismissed

JACOBS CATALYTIC INDUSTRIAL SERVICES LTD.; RE IBEW, LOCAL 353; RE GENERAL PRESIDENTS MAINTENANCE COMMITTEE FOR CANADA AND THE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO.. (Nov./Dec.) 1043

Evidence – Construction Industry Grievance – The Labourers grieved the lay-off of the entire complement of "referred members" on a job-site, that left only "name-hires" as part of the employer's work crew – The Board examined the language of the collective agreement which advocated a 50/50 rule – The Board found the employer had no explanation (reasonable or otherwise) for the manner in which it laid off the employees, therefore it had violated the lay-off provision of the collective agreement – With respect to the subsequent recall of one employee, the Board held that a "name-hire" or "referred employee" retains his or her status for the period in the collective agreement during which the employee can be recalled (i.e., a referred employee cannot be laid off and then re-hired within the relevant period as a name-hire) – Grievance allowed, matter remitted to parties to fashion appropriate remedy

E.S. FOX CONSTRUCTION LTD.; RE LIUNA, LOCAL 506........................ (Mar./Apr.) 346

Evidence – Certification – Construction Industry – Judicial Review – Natural Justice –Practice and Procedure – Reconsideration – The Carpenters moved to set aside the decision of a single judge of Divisional Court permitting the employer to rely on an affidavit in support of its judicial review application of the Board's certification decision (see [2006] OLRB Rep. September/October 756) – A full panel of the Divisional Court held that the motions judge was not "clearly wrong" in concluding that one paragraph of the affidavit ought to be received by the reviewing panel in support of the employer's allegation that it was denied natural justice by the Board – The balance of the affidavit, however, should be struck because it contains material not before the Board and it is clear the Board's decision was rendered on the basis of evidence before it – The "new evidence" foundation for judicial review cannot succeed – Motion allowed in part

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND ONTARIO LABOUR RELATIONS BOARD ....(Jan./Feb.) 249

Evidence – Duty of Fair Representation – Judicial Review – The standard of review with respect to the merits of the Board's decision was patent unreasonableness – The court found that the Board's decision on the merits and in its reconsideration were entirely reasonable: the Board concluded the union could not continue to represent the applicant because of his antagonistic and uncooperative attitude (which was unwarranted); and there was ample evidence on which to base that conclusion – The court also found no denial of procedural fairness in the manner in which the Board proceeded by consultation – A motion to introduce fresh evidence was also dismissed – Application dismissed

STEPHANE VERREAULT; RE UNITED ASSOCIATION OF JOURNEYPERSONS AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE US AND CANADA, TEAMSTERS LOCAL UNION 419; RE OLRB ....(May/June) 697

Evidence – Health and Safety – Practice and Procedure – The Board ruled on the admissibility of evidence in this health and safety appeal (for a history of the matter, see [2006] OLRB Rep. September/October 648) – The Board held that since the orders under appeal dated from 2002, only the evidence available before the issuance of the orders would be admissible – To allow the inclusion of subsequent events could condone conduct that, absent the appeal, would have constituted a contravention of the Act – Since no orders were issued regarding work done after 2002, the Board had no authority to adjudicate what happened after that date – Matter continues

1353837 ONTARIO INC./LAWRENCE RYAN; RE PETER MARTIN AND JOHN DENNIS, INSPECTORS ....(May/June) 481

Fraud – Employment Standards – Settlement – Twenty-three claimants had reached a settlement with one of three directors of SLMsoft Inc. – A term of the settlement released all three directors from any obligations, upon receipt of the entire payment by the director who signed the settlement – The payment was never made – The Board determined that the term of the settlement forfeiting the employees' entitlement to seek relief from directors only arose upon payment of the money – The Board also found that a director's purported letter of resignation was fraudulent and that it induced the claimants to enter into the settlement – Pursuant to s. 120(5) the claimants were entitled to an order voiding the settlement agreement on the basis of fraud – Matter re-listed for Hearing

SLM SOFT INC.; RE GOVIN MISIR, A DIRECTOR; RE EDDIE LAW, A DIRECTOR; DR. BUDHENDRANAUTH DOOBAY, A DIRECTOR; RE MURAT

TAYFUN CAN ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS .... (Mar./Apr.) 422

Fraud – Standing – Unfair Labour Practice – The Carpenters complained that the Sheet Metal Workers committed a fraud on the Board that led to the Board issuing certificates to the SMW in respect of units of employees engaged in roofing and siding (in *Proaction Aluminum* and *Tops Roofing*) – The SMW subsequently filed other applications for certification seeking to displace the Carpenters – While they initially sought to rely on the trade union status they were awarded in *Proaction* and *Tops*, the SMW led new evidence to establish its status, independent of the earlier applications – The Carpenters sought an order from the Board revoking the earlier certificates and barring the SMW from bringing fresh applications for a period of one year – While the Board expressed its concern for the alleged conduct of the SMW in *Proaction* and *Tops*, it found that the Carpenters had no standing to bring the instant complaint: the Carpenters had no collective agreement with either of these employers, and they could provide no evidence that they had been victims of the fraud and had suffered some loss – Application dismissed

MIKE ABAZA PROACTION ALUMINUM; RE CARPENTERS & ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51; RE EASTERN EAVESTROUGHING LTD.; RE JACKSON ROOFING GTA INC.; RE 413554 ONTARIO LTD. C.O.B. CHOUINARD BROS. ROOFING; RE BURNHAMTHORPE ROOFING; RE DONIA ALUMINUM & ROOFING LTD; RE COLOMBUS ALUMINUM AND ROOFING LTD; RE TRUDEL & SONS ROOFING LTD; RE E.P. SIDING INC.; RE EXPERT EAVESTROUGHING; RE CHOUINARD BROS. ALUMINUM LTD.; RE GIANCOLA ALUMINUM CONTRACTORS LTD.; RE GM EXTERIORS INC.; ASPEN ALUMINUM LTD.; RE GORESKI ROOFING AND LATHING LTD.; RE GTA ALUMINUM INC.; CRO ALUMINUM INC. .... (Sept./Oct.) 898

Health and Safety – Cancoil challenged the Inspector's jurisdiction to make an order under s. 54(1)(f) of the *OHSA* requiring Cancoil to conduct a heat stress assessment – The Board found that on a proper interpretive approach (given the remedial nature of the Act and providing the legislation with a broad and liberal interpretation in order to protect the health and safety of workers) temperature may be one form of "physical agent" and accordingly a heat stress assessment may be the proper subject of an order by an Inspector pursuant to s. 54 of the Act – Matter continues

CANCOIL THERMAL CORP.; RE BRAD MOON, INSPECTOR; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175 .... (Mar./Apr.) 325

Health and Safety – Construction Industry Grievance – The union complained that the employer had requested an additional drywaller, then chose not to hire the worker when it learned he did not have fall arrest training, a requirement under the *Occupational Health and Safety Act* which would qualify him as a "competent worker" – The Board found that the collective agreement at the time did not require fall arrest training for workers for them to be considered competent, therefore the employer had no legitimate reason to consider the dispatched worker not competent – The collective agreement did contemplate, however, that the employer retained the exclusive right to make decisions regarding hiring and staffing levels – Although the employer requested an additional worker, it did not hire the employee referred from the hiring hall and ultimately used only its existing complement to complete its contract – The employer did not violate the collective agreement by failing to employ the worker – But because the worker sent to the employer was competent, the union was entitled to damages under the collective agreement for the referral – Grievance allowed in part

ROSMAR DRYWALL & ACOUSTICS LTD.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 .... (Nov./Dec.) 1092

Health and Safety – Discharge – Reprisal – The applicant complained that she had been discharged for raising health and safety concerns associated with some renovations undertaken by the employer – The Board found the employer had addressed the employee's concerns in several ways, including changing the employee's shift – The Board held that the applicant had simply decided to move on to a job she knew was available to her, and wished to take advantage of what had transpired in the workplace to seek a monetary benefit – Application dismissed

IVY VETERINARY SERVICES; RE KRISTINE NEVILLE; RE DR. CATHY EMMS .... (May/June) 563

Health and Safety – Discharge – Reprisal – The applicant challenged her dismissal as a bus driver for the disabled – She was discharged after four incidents within a twelve-month period (three accidents and an instance of driving while her licence was suspended) – The applicant argued that every time she found a problem with her bus, or requested a change of bus because of an apparent malfunction, she was exercising her rights under the *Occupational Health and Safety Act* – The Board held (1) these concerns were handled by the maintenance department of the employer, (2) management was never made aware of them, and (3) these concerns could not be construed as an exercise of health and safety rights within the meaning of the Act – The Board found that progressive discipline was levied against the applicant in accordance with management policy and the collective agreement, and that termination was the appropriate response to the culminating incident – Application dismissed

TRANSHELP OF THE REGIONAL MUNICIPALITY OF PEEL; RE KYM URRY; RE CUPE LOCAL 966 .... (Jan./Feb.) 215

Health and Safety – Duty of Fair Representation – Practice and Procedure – The Board found that these two applications arose from similar facts at the workplace, and directed that they be heard together; further, the Board held that rulings made in the first application that pertain to the same facts or legal issues would be binding on the parties in the second application – The applicant alleged that he raised serious health and safety concerns about his workplace with his employer, his union and the Ministry of Labour, and that the responses and results arising from his complaints were unsatisfactory – The Board found that the union had acted properly: it participated in his reassignment when he invoked a work refusal; it took an active role in the Ministry investigations of air quality in the workplace, and it filed a grievance on the applicant's behalf when he was denied short-term assistance – Application dismissed – Second matter to be scheduled for hearing

JEREMY WOODCOCK; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ON BEHALF OF ITS LOCAL 6571; RE RONALD GOODCHILD; RE GERDAU AMERISTEEL INC. .... (Mar./Apr.) 390

Health and Safety – Employment Standards – Reprisal – Work Refusal – The employee alleged he was dismissed because he had raised concerns with his employer regarding overtime pay and the safety of a van used in the course of his employment, contrary to s. 74 of the ESA and s. 50 of the OHSA, respectively – The Board held that there was no requirement under s. 50 of the OHSA for the employee to first comply with the Act *and then* seek its enforcement; rather, it is sufficient that the worker acted in compliance with the Act *or* sought its enforcement *or* gave evidence in a proceeding in relation to the enforcement of the Act – The Board held that there was no evidentiary basis for concluding that the employee had raised the subject of the safety of the van with his employer – The evidence revealed that the employee and employer engaged in an argument regarding the effect a diesel leak in the van would have on the employee's license, and this led to his discharge – No issue of overtime was raised during the argument – Application for review of ESO's decision not to issue an order finding a breach of s. 74 of the ESA dismissed – Employer found not to be in breach of s. 50(1) of the OHSA – Matter referred to Field Services to resolve Board's exercise of discretion under s. 50(7) of the OHSA – Matter continues

TRI-GREEN CONSTRUCTION INC.; RE DARRYL HICKEY ....(Jul./Aug.) 831

Health and Safety – Evidence – Practice and Procedure – The Board ruled on the admissibility of evidence in this health and safety appeal (for a history of the matter, see [2006] OLRB Rep. September/October 648) – The Board held that since the orders under appeal dated from 2002, only the evidence available before the issuance of the orders would be admissible – To allow the inclusion of subsequent events could condone conduct that, absent the appeal, would have constituted a contravention of the Act – Since no orders were issued regarding work done after 2002, the Board had no authority to adjudicate what happened after that date – Matter continues

1353837 ONTARIO INC./LAWRENCE RYAN; RE PETER MARTIN AND JOHN DENNIS, INSPECTORS..(May/June) 481

Health and Safety – Interim Relief – The employer sought an appeal and suspension of an Order made by an Inspector – At issue were what measures are necessary to protect the health and safety of nurses required to enter areas that are undergoing a "level 2 or higher" search for weapons in a correctional centre – The Board invoked its interim relief powers under the OHSA: (1) relieving the employer of its obligation to purchase custom-made vests for the Nurses; (2) instead, requiring the employer to provide Nurses who deliver medication in cells during searches with a vest that fits reasonably well; and (3) ordering the employer to continue the "delivery of essential medications during searches in cellular accommodation areas" in accordance with its own memorandum – In light of the interim order, the suspension was granted – Appeal continues

CENTRAL NORTH CORRECTIONAL CENTRE ; RE OPSEU AND INSPECTOR JOE ZAHER..(Nov./Dec.) 1029

Health and Safety – The Board has the jurisdiction to review an order of an inspector under s. 61 – Where a Regional Director of the Ministry of Labour, who is also an inspector under the *OHSA*, makes an Order under s. 9 as the delegate, or purported delegate, of the Minister, the Board has no jurisdiction to review the Regional Director's action – Whether the Regional Director was acting under properly delegated authority is a matter for the Superior Court of Justice, not the Board – Applications dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD AND SOPHIE DENNIS, INSPECTOR; RE ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION; RE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO..................(Jul./Aug.) 763

Health and Safety – The employer sought suspension of an order requiring it to develop and implement a written violence prevention program – The employer asserted that contrary to the inspector's order, it already had both anti-violence and anti-harassment policies and that the policies were part of the employer's orientation program – Further, the employer claimed there had never been any incidents of actual violence in the workplace – The Ministry argued the order was issued in response to specific threats of violence directed at one employee – The Board found that the inspector had ignored the existence of the employer's policies and the order failed to acknowledge the employer's efforts in dealing with the perceived threats – Since the employer successfully argued all three elements of the test for a suspension, the Board held that there were no grounds on which to defer to the inspector – Suspension granted

SKYJACK INC.; RE SUE HUTCHINSON, INSPECTOR................................(Jan./Feb.) 191

Health and Safety – The Steelworkers appealed the failure of the Ministry of Labour to conduct a thorough and complete investigation into whether or not a multi-site joint health and safety committee was in operation without the workplace parties' consent – The Board held that it had no jurisdiction to make orders against inspectors (to conduct an investigation), and found there was no requirement in the Act that workers or trade unions consent to the form of the joint health and safety committee in the workplace – Application dismissed

UNIVERSITY OF GUELPH AND KELLIE HARRISON, INSPECTOR; RE UNITED STEELWORKERS LOCAL 4120...(Jul./Aug.) 841

Hospital Labour Disputes Arbitration Act – Reference – This Ministerial reference requested the Board's advice on whether employees of Montfort Renaissance Inc. ("MRI") were covered by the Act – The Board used the following criteria to determine whether MRI met the statutory definition of a "hospital" as set out in the HLDAA: (i) the entity must serve persons who suffer from physical or mental illness, ongoing disease or be convalescent or chronically ill; (ii) the entity must be a hospital or "other institution"; and (iii) the entity must be operated for the observation, care or treatment of such persons – Firstly, the Board held that there could be no doubt that persons whom MRI served in all three of its programs (mental health and housing, health stop, and Detox Centre) were persons who suffered from physical or mental illness – Secondly, having regard to the purpose of the HLDAA, which is to ensure uninterrupted delivery of services to those vulnerable persons whose health and safety could be jeopardized if those services were unavailable because of a strike or lockout, the Board found that MRI's Detox Centre met the definition of "hospital" in the HLDAA – In response to MRI's assertion that the Addiction Workers working in the Detox Centre did not provide services that could be characterized as medical in nature and did not have any medical training, the Board held that the observation, care or treatment contemplated under HLDAA need not be medical in nature to fall within the statutory definition – Thirdly, the Board was satisfied that the Detox Centre was operated for the observation, care and treatment of residents in the detoxification process – Finally, regarding the question of whether MRI, when considered as a whole (all three programs), was properly characterized as an "other institution", the Board held that it was, since the statutory scheme contemplated the possibility of over-inclusion – In the result, the Board's advice to the Minister was that MRI was a "hospital" within the meaning of the HLDAA

MONTFORT RENAISSANCE INC. (SERVICE DE SANTÉ DES SOEURS DE LA CHARITÉ D'OTTAWA); RE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4540 .... (Sept./Oct.) 909

Interest Arbitration – *Ambulance Services Collective Bargaining Act, 2001* – Essential Services Agreement – Lock-Out – Strike – The union and the employer entered into an essential service agreement pursuant to the *ASCBA* where the number of employees who must work during a strike or lock-out were the exact same number that would be employed in the normal course – The employer's application asked the Board to find that "no meaningful lock-out can occur" in the circumstances and to direct binding arbitration to settle the collective agreement, while the union's application asked the Board to find that the employer had breached the essential services agreement – The Board found that for a lock-out (or strike) to be "meaningful" it must permit "the application of economic sanctions in order to further and support the collective bargaining process" – Since no employees would be locked out as a result of the essential service agreement, the Board concluded that the essential service agreement between the parties effectively precludes the employer from engaging in a lock-out – Employer's application allowed; final and binding interest arbitration directed; union's application dismissed

SUN PARLOUR EMERGENCY SERVICES INCORPORATED (ESSEX DIVISION); RE SEIU, LOCAL 1.ON .... (Mar./Apr.) 447

Interference with employers' organization – Collective Bargaining – Construction Industry – Intervenors – Parties – Unfair Labour Practice – Three of five constituent member associations of PEBAL filed a complaint alleging the LEBA together with the other two constituent members of PEBAL interfered in the administration of the employers' organization contrary to s. 71 of the Act – The Board ruled on four preliminary motions raised by the responding parties – First, the Board found that the members of the employers' organization had a direct legal interest in having their organization operate without interference by a trade union and accordingly had standing – Second, the Board declined to determine whether the applicants had pled a *prima facie* case and dismissed the responding parties' motion to dismiss – Third the Board declined to exercise its discretion to refuse to entertain the complaint – Finally, the Board found merit in the responding parties' submissions seeking to defer the matter pending the outcome of an Industrial Inquiry Commission, given that through its mandate the Commission would provide a much better forum for discussing the parties' differences – Adjourned pending release of Commission's report

ONTARIO MASONRY CONTRACTORS ASSOCIATION; RE CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF ONTARIO; RE SEALANT AND WATERPROOFING ASSOCIATION; RE INDUSTRIAL CONTRACTORS ASSOCIATION OF CANADA; RE CONCRETE FLOOR CONTRACTORS ASSOCIATION OF ONTARIO .... (May/June) 607

Interference with Trade Union – Employee – Remedies – Unfair Labour Practice – The collective agreement between the University and YUSA included eligibility to participate in a pension plan and post-retirement benefits – The University, arguing retirees were not employees, refused to provide YUSA with the names and addresses of persons who had retired from the University and had been employed in the bargaining unit represented by YUSA immediately prior to their retirement – The Board did not find it necessary to determine whether retirees were "employees" for at least some purposes of the Act – The Board found as long as it was arguable that YUSA had an obligation or the right to pursue a grievance respecting the continued provision of benefits to retirees

in accordance with the collective agreement provisions, the denial of information to it amounted to an interference with its administration, contrary to section 70 – Declaration and direction that information be provided

YORK UNIVERSITY; RE YORK UNIVERSITY STAFF ASSOCIATION....(May/June) 659

Interim Order – Unfair Labour Practice – The applicant sought interim reinstatement of five laser operators it alleged were laid off because of their participation in the applicant's organizing drive – The employer argued it had *bona fide* business reasons for the lay-offs, as well as for the choices of individuals it chose to lay off – The Board applied the criteria for interim relief found in s. 98 of the Act – For three of the employees, whom the Board found to be organizers, the Board was not able to conclude that their lay-offs were unrelated to the organizing campaign – For the other two employees, who were supporters but not organizers, the Board again could not conclude the employer's motives were completely unrelated to the union's drive – Interim order granted

CLAYSON STEEL (1988) INC.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)....(Jan./Feb.) 57

Interim Relief – Constitutional Law – Intervenor – Judicial Review – Reference – Unfair Labour Practice – On a ministerial reference regarding the appointment of a conciliator, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – On judicial review, the Divisional Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the appellant had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the Court held that the Board had the statutory authority to conduct the proceedings as it did – The application for judicial review was dismissed – On appeal, the Court of Appeal noted that – (1) there was still no evidence of an aboriginal practice, custom or tradition that supports the right to enact a distinct Code – (2) such a practice would not be integral to the distinctive culture of the appellant – (3) there was no reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim – The decisions of the Board and Divisional Court were correct – Considering the Crown's duty to consult and accommodate the aboriginal claim, the Court found that meaningful consultation could not have taken place because the appellant had not made known its claim during the unionization drive and certification proceedings – The Court also found that the appellant, rather than the Crown, had taken peremptory and unilateral action which initiated the dispute – The Crown did not breach its duty to consult and accommodate – Appeal dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB....(Nov./Dec.) 1197

Interim Relief – Discharge for Union Activity – Unfair Labour Practice – The employer laid off 45 of the most junior employees due to a reduction in demand from its sole customer – The employer initially told its employees that they would be recalled by seniority – The employer then told its employees that the lay off would be permanent – Approximately eight months later, the employer recalled three employees – The union argued that one of the laid off employees, a known union organizer, was not recalled according to seniority – The union sought interim reinstatement pursuant to s. 98 of the Act for the 45 laid off employees, according to their seniority and the employer's need – The employer argued that the lay off lasted longer than 13 weeks and the three individuals were new hires – The Board relied on the fact that the union was not actively soliciting support in the form of membership cards and that there was no impending representation vote – The Board held that the union was not in a particularly vulnerable point in its campaign to establish bargaining rights – The Board was not persuaded that the relief was necessary to prevent irreparable harm and accordingly, the union's application did not meet the condition in clause 3 of s. 98(2) of the Act – Interim Relief denied

INTERNATIONAL UNION UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CLC); RE WALLACEBURG PREFERRED PARTNERS CORP....................................(Nov./Dec.) 1174

Interim Relief – Health and Safety – The employer sought an appeal and suspension of an Order made by an Inspector – At issue were what measures are necessary to protect the health and safety of nurses required to enter areas that are undergoing a "level 2 or higher" search for weapons in a correctional centre – The Board invoked its interim relief powers under the OHSA: (1) relieving the employer of its obligation to purchase custom-made vests for the Nurses; (2) instead, requiring the employer to provide Nurses who deliver medication in cells during searches with a vest that fits reasonably well; and (3) ordering the employer to continue the "delivery of essential medications during searches in cellular accommodation areas" in accordance with its own memorandum – In light of the interim order, the suspension was granted – Appeal continues

CENTRAL NORTH CORRECTIONAL CENTRE ; RE OPSEU AND INSPECTOR JOE ZAHER..(Nov./Dec.) 1029

Interim Relief – Jurisdictional Dispute – Construction Industry – Reconsideration – Remedies – Strike – In the context of a jurisdictional dispute the Board issued an interim order, on reconsideration, assigning the disputed work to the Carpenters, after determining that the Labourers had engaged in strike activity designed solely to influence the assignment of work – The Board noted that the purpose of an interim order in a s. 99 context is to maintain the "status quo" pending the resolution of the application – The Board found that the "status quo" for the disputed work was that it had been performed exclusively by members of the Carpenters – The Board also noted, without deciding, that the Labourers claim to bargaining rights, and therefore a right to strike, at the project in question was problematic – The Board found that the Labourers had not negotiated or concluded any new collective agreements with the struck employers at the project – The only benefit that the Labourers had obtained as a result of the strike was an agreement from the constructor and two contractors to assign the disputed work only to subcontractors who employed members of Labourers – The Board therefore concluded that the sole purpose of the strike was to exert economic pressure on the constructor to assign the disputed work to the Labourers – The Board has consistently found that to engage in a strike in order to secure a work assignment is either unlawful or improper such that it will grant interim relief, whether or not the strike is otherwise lawful – The structure of the Act properly recognizes that pressing the issue of the assignment of particular work to impasse is undesirable, given its effect on the potential rights of parties outside the bargaining process – Such action tends to promote a similar strike response from the third-party union (as occurred in this case), rather than the resolution of the dispute under s. 99 without a work stoppage – The Board's interim order directing that the work be assigned to the Carpenters was not made effective until two weeks after the order, or when it would have been made but for the illegal response strike of the Carpenters – Matter continues

SNC-LAVALIN POWER ONTARIO 1409096 ONTARIO LIMITED C.O.B. AS PERI SCAFFOLDING AND ALUMA SYSTEMS CANADA INC.; RE CARPENTERS DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE LIUNA, LOCAL 506 ....(Jul./Aug.) 800

Interim Relief – Trusteeship – Local 31 filed a s. 149 application challenging the imposition of supervision over it by BACU – BACU sought interim relief from the Board to be able to continue its trusteeship because of the Local's alleged failure to resist displacement overtures brought by another union – The Board held that s. 98(1)(a) gave it the authority to do what was necessary to preserve its processes; an interim ruling might well be required to preserve some prevailing conditions for the purpose of being able to adjudicate them – The Board found that BACU had successfully met the three factors necessary for the granting of interim relief: (1) BACU has put forward a defence to the s. 149 complaint that makes out a strong *prima facie* case; (2) the parent union will suffer irreparable harm in that if the relief is not granted, their ability to participate meaningfully in the litigation will be nullified; and (3) the balance of labour relations harm points to maintaining the integrity of the Board's processes until the substantive relief can be adjudicated – Furthermore, Local 31 appeared to have taken the law into its own hands rather than have the Board or the courts deal with its dispute with BACU when it transferred its assets to a new membership trust fund – The Board amended its earlier ruling of April 16, 2007 and refrained from making any order with respect to the trust fund; similarly, it made no determinations with respect to other monies held by the various parties in these proceedings – Interim relief granted

MARBLE, TILE & TERRAZZO, LOCAL 31; RE BRICK AND ALLIED CRAFT UNION; RE KERRY WILSON; RE TOM WILLIAMS; RE JOHN HAGGIS; RE JOE PLUNKETT; RE CAMERON MACKAY; RE FRANK ROCCA.....................(May/June) 587

Intervenor – Accreditation – Construction Industry – Standing – In this application for accreditation for all employers of employees engaged in concrete forming construction, the parties to the Carpenters' ICI collective agreement, which also engage in concrete forming construction, sought status as intervenors – The Board found that the intervenors could not be legally affected by the accreditation proceeding since the accreditation order is limited to the employers with whom the responding party has a collective agreement relationship; and where an employer is bound by both the intervenors' ICI agreement and the applicants' and respondents' agreement an accreditation order would neither detract from the bargaining rights held by the intervenors, nor expand the bargaining rights of the responding party – The Board also found nothing special or unique about this accreditation proceeding that would warrant the Board's exercise of its discretion to grant intervention by parties without a legal interest in the matter – Standing denied – Applicants' motion granted

THE ONTARIO FORMWORK ASSOCIATION; RE THE FORMWORK COUNCIL OF ONTARIO; RE CARPENTERS EMPLOYER BARGAINING AGENCY; RE CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA..(Nov./Dec.) 1125

Intervenor – Certification – Construction Industry – A number of trade unions and employer bargaining agencies sought to intervene as *amicus curiae* in this certification application, arguing they wanted to present the Board with views regarding the undesirability of having the applicant trade union succeed and the potential destabilization in the construction industry should the applicant be found to be a trade union (its status has not yet been established) – The Board rejected the intervention of those seeking *amicus curiae* standing, relying on its own significant knowledge and experience in construction – When the Formwork Council challenged some of the voluntary recognition agreements relied on by the applicant, the applicant was invited to respond to the challenge – The Carpenters alleged the respondent employer was related to companies they were pursuing in another Board application – Application for certification joined with other Carpenter applications – Matter continues

PBS GENERAL CONTRACTORS INC.; RE CANADIAN CONSTRUCTION WORKERS' UNION; RE DRYWALL ACOUSTIC LATHING AND INSULATION, LOCAL 675; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE TABRCO MANAGEMENT LTD.; RE TARGET DRYWALL & ACOUSTICS LTD. ....(Jan./Feb.) 158

Intervenor – Constitutional Law – Interim Relief – Judicial Review – Reference – Unfair Labour Practice – On a ministerial reference regarding the appointment of a conciliator, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – On judicial review, the Divisional Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the appellant had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the Court held that the Board had the statutory authority to conduct the proceedings as it did – The application for judicial review was dismissed – On appeal, the Court of Appeal noted that – (1) there was still no evidence of an aboriginal practice, custom or tradition that supports the right to enact a distinct Code – (2) such a practice would not be integral to the distinctive culture of the appellant – (3) there was no reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim – The decisions of the Board and Divisional Court were correct – Considering the Crown's duty to consult and accommodate the aboriginal claim, the Court found that meaningful consultation could not have taken place because the appellant had not made known its claim during the unionization drive and certification proceedings – The Court also found that the appellant, rather than the Crown, had taken peremptory and unilateral action which initiated the dispute – The Crown did not breach its duty to consult and accommodate – Appeal dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB ....(Nov./Dec.) 1197

Intervenors – Collective Bargaining – Construction Industry – Duty to Bargain in Good Faith – Parties – Unfair Labour Practice – Three of five constituent member associations of PEBAL filed a complaint alleging the LEBA together with the other two constituent members of PEBAL breached s. 17 of the Act – The applicants allege that LEBA and the two other constituent members, by entering into agreements extending the scope of their appendices and subcontracting provisions, have forced a recognition issue to impasse, since PEBAL cannot adopt an agreement entered into by some members that has a direct negative impact on its other members – The Board found that just as there is no duty to bargain in good faith owed to employees, there is no duty owed to the constituent members of PEBAL – The Board further noted that while it is charged with determining the applications or complaints that are filed with it, the Board must be satisfied the applicants do not just have an interest in the matter, but have the legal right to proceed with the complaint – Here the Board found since there is no duty on LEBA to bargain in good faith with the constituent members of PEBAL, the applicants do not have the legal right to assert that LEBA violated the duty to bargain in good faith owed to PEBAL – Finally the Board characterized this matter as one of a complaint about the manner in which two of the five constituent members of PEBAL have dealt with the other three members (and how LEBA has taken advantage of this schism), and not as one encompassed by s. 17 of the Act – Application dismissed

ONTARIO MASONRY CONTRACTORS ASSOCIATION; RE CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF ONTARIO; RE SEALANT AND WATERPROOFING ASSOCIATION; RE INDUSTRIAL CONTRACTORS ASSOCIATION OF CANADA; RE CONCRETE FLOOR CONTRACTORS ASSOCIATION OF ONTARIO...(May/June) 600

Intervenors – Collective Bargaining – Construction Industry – Interference with employers' organization – Parties – Unfair Labour Practice – Three of five constituent member associations of PEBAL filed a complaint alleging the LEBA together with the other two constituent members of PEBAL interfered in the administration of the employers' organization contrary to s. 71 of the Act – The Board ruled on four preliminary motions raised by the responding parties – First, the Board found that the members of the employers' organization had a direct legal interest in having their organization operate without interference by a trade union and accordingly had standing – Second, the Board declined to determine whether the applicants had pled a *prima facie* case and dismissed the responding parties' motion to dismiss – Third the Board declined to exercise its discretion to refuse to entertain the complaint – Finally, the Board found merit in the responding parties' submissions seeking to defer the matter pending the outcome of an Industrial Inquiry Commission, given that through its mandate the Commission would provide a much better forum for discussing the parties' differences – Adjourned pending release of Commission's report

ONTARIO MASONRY CONTRACTORS ASSOCIATION; RE CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF ONTARIO; RE SEALANT AND WATERPROOFING ASSOCIATION; RE INDUSTRIAL CONTRACTORS ASSOCIATION OF CANADA; RE CONCRETE FLOOR CONTRACTORS ASSOCIATION OF ONTARIO...(May/June) 607

Judicial Review – Certification – Construction Industry – The Board certified the Painters' union in this card-based application when the employer failed to file a response in a timely fashion pursuant to s. 128.1(3) – In its request for reconsideration of the Board's decision certifying the union, the responding party relied on the fact that it had delivered its response to the union in a timely manner but, through inadvertence, had failed to file the response with the Board – Relying on *Air-Kool*, the Board held that it had no discretion to extend the time to accept the response – On judicial review, the court held the Board to a standard of correctness and found the Board had erred in interpreting s. 128.1(3) as a limit on its ability to accept a late filing – The word "shall" in the provision was a directory imperative, but aimed only at the employer, not the Board – Application for judicial review granted

MAYSTAR GENERAL CONTRACTORS INC.; RE IUPAT, LOCAL 1819; RE ONTARIO LABOUR RELATIONS BOARD .... (Mar./Apr.) 459

Judicial Review – Duty of Fair Representation – Leave to Appeal Refused

STEPHANE VERREAULT; RE OLRB; RE TEAMSTERS LOCAL UNION 419, UA LOCAL 787 ....(Nov./Dec.) 1210

Judicial Review – Alteration of Jurisdiction – Construction Industry – Natural Justice – Practice and Procedure – The Local alleged that the Board's decision, finding just cause for the International to assume jurisdiction of the Local over a computer centre construction project in Barrie, should be quashed on a number of grounds – The Board, noting that s. 147(5) operated to stay the assumption of the Local's jurisdiction, was concerned that a full hearing might render the result inconsequential and moot, sine the project was near completion held a two day consultation in accordance with Rule 41, as the situation required a speedy resolution – The Board, having acknowledged that there were facts in dispute, determined there was sufficient uncontested material to permit it to reach an appropriate decision – The Board fashioned a specific remedy placing restrictions and conditions on the International's transfer of jurisdiction – On judicial review, the court first found that Rule 41 was not *ultra vires*, since there was no improper delegation of authority by the Chair, nor was the rule inconsistent with the scheme of the Act – The court found that the rule sets a standard that must be met before a Vice Chair may exercise their discretion in the circumstances of a particular case, and that the Rule is entirely consistent while noting that the Board "operates in a complex, dynamic, and highly fluid environment where expeditious rulings and informal and accessible procedures are often essential to maintaining the delicate balance between the parties' various interests" – Second, the court found that the Board did not deny the Local natural justice by proceeding with a consultation rather than a full hearing, since the core value embraced by the *audi alteram partem* maxim was met by the Board: providing the parties with an opportunity to be heard – The court also found it was not patently unreasonable for the Board to have chosen this procedure, since the Board was given the authority to balance the need for complete natural justice on the one hand against expedition on the other – Third, the court found that the Board did not exceed its jurisdiction by making findings of fact in the absence of any evidence, since there was evidence before it, the sufficiency and weight of which were within its exclusive jurisdiction, permitting it to make its decision – Fourth, the court found that the Board did not deny natural justice by failing to provide adequate reasons, since it provided a sufficiently adequate explanation of the process it engaged in, the conclusions it reached, on what it founded those conclusions and the results of its conclusions – Finally the court found that the Board's decision on the merits was not patently unreasonable: it was a sound and sensible decision in circumstances of acrimony that permitted the appropriate labour relations objective to be achieved, with the least intrusion on the rights of the Local's members – Application dismissed

IBEW, LOCAL 1739; RE GUILD ELECTRIC LIMITED; RE OLRB ....(May/June) 669

Judicial Review – Certification – Construction Industry – Evidence – Natural Justice – Practice and Procedure – Reconsideration – The Carpenters moved to set aside the decision of a single judge of Divisional Court permitting the employer to rely on an affidavit in support of its judicial review application of the Board's certification decision (see [2006] OLRB Rep. September/October 756) – A full panel of the Divisional Court held that the motions judge was not "clearly wrong" in concluding that one paragraph of the affidavit ought to be received by the reviewing panel in support of the employer's allegation that it was denied natural justice by the Board – The balance of the affidavit, however, should be struck because it contains material not before the Board and it is clear the Board's decision was rendered on the basis of evidence before it – The "new evidence" foundation for judicial review cannot succeed – Motion allowed in part

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND ONTARIO LABOUR RELATIONS BOARD ....(Jan./Feb.) 249

Judicial Review – Conflict of Interest – Trusteeship – In the ongoing dispute involving LIUNA, Local 183 and two of its pre-trusteeship executives, the Board was asked to rule on the conflict of interest of counsel for the two former executives because of his firm's access to or knowledge of confidential information relating to Local 183 – The Board held there was no conflict because the firm possessed no knowledge outside of what it had learned from its clients to support the litigation, and there had been no change in positions or movement of any lawyers from one side of the litigation to the other - On judicial review, on a standard of correctness, the Divisional Court quashed the Board decision, stating that the prejudice to Local 183 must be "approached on an objective basis of perception by a reasonably informed member of the public, as well as within the context of the continuing importance of the duty of client loyalty and confidence of all parties and the public in the administration of justice" – In the Court's view, all the information held by the law firm related to the trusteeship and its litigation – Although no lawyers had changed sides in the dispute, Local 183's stance shifted from opposition to LIUNA to a position allied in interest with the parent – Citing the Supreme Court of Canada in *MacDonald Estate*, the Court held that a "lawyer who has relevant confidential information cannot act against his client or former client" – Application for judicial review allowed(Board decision reported at [2006] OLRB Rep. November/December 848)

RICHARD WEISS AS TRUSTEE FOR LOCAL 183; RE ONTARIO LABOUR RELATIONS BOARD; RE ANTONIO DIONISIO AND JOHN DIAS .... (Mar./Apr.) 466

Judicial Review – Constitutional Law – Interim Relief – Intervenor – Reference – Unfair Labour Practice – On a ministerial reference regarding the appointment of a conciliator, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – On judicial review, the Divisional Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness –

The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the appellant had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the Court held that the Board had the statutory authority to conduct the proceedings as it did – The application for judicial review was dismissed – On appeal, the Court of Appeal noted that – (1) there was still no evidence of an aboriginal practice, custom or tradition that supports the right to enact a distinct Code – (2) such a practice would not be integral to the distinctive culture of the appellant – (3) there was no reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim – The decisions of the Board and Divisional Court were correct – Considering the Crown's duty to consult and accommodate the aboriginal claim, the Court found that meaningful consultation could not have taken place because the appellant had not made known its claim during the unionization drive and certification proceedings – The Court also found that the appellant, rather than the Crown, had taken peremptory and unilateral action which initiated the dispute – The Crown did not breach its duty to consult and accommodate – Appeal dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB ....(Nov./Dec.) 1197

Judicial Review – Construction Industry – Jurisdictional Dispute – The Bricklayers brought an application for judicial review of the Board's decision finding that the employer's assignment of stone masonry work on the Victoria Memorial Museum Building in Ottawa to the Plasterers was correct – All parties agreed that the standard of review was patent unreasonableness when the Board deals with jurisdictional disputes – The court found that the Board "conducted a thorough and careful review of the factors that Board jurisprudence has evolved as relevant and helpful" and that there was a clear "line of reasoning leading to the conclusions reached" – Accordingly the decision was not patently unreasonable and the application was dismissed

IUBAC, LOCAL 7 ; RE OPERATIVE PLASTERERS, CEMENT MASONS, RESTORATION STEEPLEJACKS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, UNION LOCAL 598 ; RE COLONIAL BUILDING RESTORATION; RE LIUNA, LOCAL 527; RE 921879 ONTARIO LIMITED; RE MASONRY INDUSTRY EMPLOYERS COUNCIL OF ONTARIO; RE ONTARIO MASONRY CONTRACTORS ASSOCIATION..................... (Mar./Apr.) 454

Judicial Review – Construction Industry – Parties – Related Employer – Sale of Business – Settlement – The Council brought a motion to quash the judicial review, characterizing it as prematurely seeking a review of an interim decision of the Board – In the 69/1(4) application the responding party employers brought a motion to the Board to dismiss the application because of Minutes of Settlement purporting to bind the Council and any of its affiliates from bringing such applications for ten years – The Board found that although the individual who signed the agreement on behalf of Local 586 was also the President of the Council there was no evidence that he had actual or ostensible authority to bind the Council – The Board dismissed the employers' motion and the sale of business/related employer applications continued before the Board, although the hearing on the merits had not yet commenced – The employers filed for judicial review –The court found this to be an exceptional or extraordinary situation that should properly be reviewed prior to the Board dealing with the merits – The court also assisted the parties in providing affidavit evidence to reflect the evidence that was before the Board

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO .... (Jan./Feb.) 284

Judicial Review – Construction Industry – *Public Sector Labour Relations Transition Act* – Related Employer – Sale of Business – The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – The GECDSB sought judicial review of the Board's ruling – A majority of the Court confirmed the Board's finding that while the *PSLRTA* specifically precludes the application of s. 69 of the *Labour Relations Act, 1995* to events covered by that legislation, nothing in the *PSLRTA* prevented the Board from exercising its discretion under s. 1(4) to the same events – Application for judicial review dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD .... (Jan./Feb.) 255

Judicial Review – Construction Industry – *Public Sector Labour Relations Transition Act* – Related Employer – Sale of Business – Leave to appeal to Court of Appeal dismissed – Leave to appeal to Supreme Court of Canada dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD .... (Nov./Dec.) 1197

Judicial Review – Delay – Duty of Fair Representation – The applicant brought a motion before a single judge of the Divisional Court to overturn the Court's Registrar's dismissal of the application for judicial review for failure to perfect in a timely way (the applicant had lost a duty of fair representation complaint at the Board, because of undue delay) – The judge found no compelling reasons to vary the Registrar's ruling and confirmed there was nothing patently unreasonable about the Board's decision – Motion dismissed

KOSTANTINOS IAONNIDIS; RE ATU LOCAL 1572, CORPORATION OF THE CITY OF MISSISSAUGA, TRANSPORTATION AND WORKS DEPARTMENT, TRANSIT DIVISION .... (Jan./Feb.) 291

Judicial Review – Duty of Fair Representation – Evidence – The standard of review with respect to the merits of the Board's decision was patent unreasonableness – The court found that the Board's decision on the merits and in its reconsideration were entirely reasonable: the Board concluded the union could not continue to represent the applicant

because of his antagonistic and uncooperative attitude (which was unwarranted); and there was ample evidence on which to base that conclusion – The court also found no denial of procedural fairness in the manner in which the Board proceeded by consultation – A motion to introduce fresh evidence was also dismissed – Application dismissed

STEPHANE VERREAULT; RE UNITED ASSOCIATION OF JOURNEYPERSONS AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE US AND CANADA, TEAMSTERS LOCAL UNION 419; RE OLRB....(May/June) 697

Judicial Review – Duty of Fair Representation – Reconsideration – The Board exercised its discretion not to inquire into a duty of fair representation complaint when it ascertained the complaint was virtually identical to an earlier application that the applicant had withdrawn – The Board subsequently dismissed the applicant's request for reconsideration – On judicial review, the Court found the Board had acted reasonably and within its jurisdiction – Application for judicial review dismissed

SCADUTO; RE UFCW .... (Sept./Oct.) 981

Judicial Review – Employment Standards – Related Employer – Termination – Three companies appealed the ESO's order that they owed termination and severance pay to nearly 100 employees as a result of a finding that they were related businesses to "C," a bankrupt company, and should be treated as one employer pursuant to s. 4 of the Act – The Board found that s. 4 requires a finding that both subsections (a) and (b) be answered positively, and that there must be a causal connection between the "relatedness" of the companies and the insolvency before there is a declaration of one employer under the section – The Board allowed the application – The employees applied for judicial review – The court held that the applicable standard of review was reasonableness, as per s. 119(14) of the Act – The court affirmed the Board's interpretation of the test under s. 4 that there must be some connection between the relationship [between the companies] and the insolvency - The Board fully considered whether there was any *intent* to defeat the purposes of the Act when it considered how the owner came to acquire company "C" and that its status as a company separate from the others was at the insistence of the financing bank, not the principals – The Board also clearly considered the *effect* of the corporate structure in determining whether the purposes of the ESA had been defeated, and properly concluded that, rather than contributing to the insolvency, the other companies had "propped up" company "C" - There was sufficient evidence for the Board to conclude that the owner had not made a bankruptcy proposal "designed for rejection" – The Board did not err in considering cases decided under the former s. 12, as the issue of intent to defeat the ESA is still relevant under the current provision – The Board properly considered the conduct of the creditors in bringing about the bankruptcy in considering whether there was any impropriety connected with the insolvency, and whether the principals made reasonable efforts to avoid it – It was reasonable for the Board to conclude that the resources invested in a 'phoenix' company were not sufficient to keep company "C" operating – The Board's decision was reasonable on the facts before it – Application for judicial review dismissed

ABDURAHMAN ABDOULRAB ET AL; RE NOVAQUEST FINISHING INC., CATELECTRIC INC., 4064186 CANADA INC. AND THE ONTARIO LABOUR RELATIONS BOARD ....(Jul./Aug.) 842

Judicial Review – Employment Standards – The Board found that the employee was not guilty of wilful misconduct, disobedience or wilful neglect of duty – After a change of supervisors which brought about a change in company policy, the employee believed he still could sell used, non-warranty catalytic converters for his own benefit – The Board found his discharge was caused by a misunderstanding, granted the employee's appeal, and ordered the employer to pay termination pay – On judicial review the Court found the Board was entitled to come to the conclusion on the evidence – Application dismissed

ONTARIO LIMITED o/a OAKVILLE HONDA; RE CREYOS BATCHELOR AND OLRB..(Nov./Dec.) 1210

Judicial Review – Jurisdictional Dispute – Natural Justice – The Iron Workers claimed that Comstock wrongly assigned I-beam installation work to members of the UA –The Iron Workers referred to approximately 20 civil drawings in their reply submissions in order to demonstrate that the work in question belonged to it – The Board decided that it could not determine what weight ought to be given to the drawings – The Board found that the work in dispute was properly assigned to the UA – On judicial review, the Iron Workers argued that the Board had violated natural justice and procedural fairness by failing to consider the drawings – The Court found that the Board had considered the drawings but did not find them helpful to the resolution of the issue in its first decision; the Iron Workers had failed to raise the issue of the drawings in their request for reconsideration – Application for judicial review was dismissed

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 736; RE COMSTOCK CANADA LTD., UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 527, ONTARIO LABOUR RELATIONS BOARD, BRUCE POWER LP..(Nov./Dec.) 1197

Judicial Review – Lock-out – Natural Justice – Practice and Procedure – Reconsideration – Strike – The TTC brought an application for a declaration that its employees were about to engage in an illegal strike at the start-up of the morning shift – The Board provided notice to the union and counsel who normally acted for the union of a 5:30 a.m. hearing by conference call to deal with the application, leaving telephone messages and sending a facsimile to the union's office – The Board held that the union had been served with the application and had received notice of the hearing – The Board ordered the employees to cease and desist from any further engagement in the unlawful strike – The ATU alleged the TTC had illegally locked out its employees, and also sought reconsideration of the earlier cease and desist order (the Whitaker decision) – The Board held that no lock-out was taking place, and stated that the parties could have had their differences considered through the grievance and arbitration process – The Board also found that the illegal strike was continuing – The Board stated that even if it were to find that the union had not received notice of the earlier hearing, it was not appropriate to vary the Board's order – The union had full opportunity to make the submissions it would have been able to make earlier – Lock-out application dismissed; reconsideration of strike application denied – On the judicial review, the union took the position that the Board exceeded its jurisdiction by conducting an "expedited hearing", without authority and that natural justice was breached by proceeding without the union in the first hearing and by unfairly limiting the union's presentation time in the second hearing – The court noted that context is often the balancing ingredient when weighing the undeniable tension as among the tribunal's ability to control its process, the duty of fairness and the degree of deference courts should afford the exercise of the tribunal's discretion – The court found that the Board was not proceeding pursuant to its authority under section 110(18) and Rule 41, but rather pursuant to the abridgement provisions in its general Rules – In derogating from the norm through abridgement, the Board may only vary times, not eliminate them; it must give notice of a hearing, although it may vary the manner of doing so; it must conduct a hearing, although it may allow it to proceed electronically; it must allow the parties full opportunity to present evidence and make submissions, although it may direct how this is to be done, including orally or in writing, whether by evidence admissible in court of law or not – The court reviewed the factors to be applied in assessing the Board's duty of procedural fairness as set out in *Baker*, concluding that the Board merits a high degree of deference with respect to the fairness of its procedural decisions – The court found that the circumstances, in this case, were extreme and warranted quick intervention and that the Board's abridgement of times and procedures, and its finding of proper service and notice were appropriate in the context of the situation and did not operate as a breach of fairness – The court found nothing wrong with limiting the time for presentations in the second hearing and that the union had sufficient and fair opportunity to present its evidence and make its position clear – Finally, the court found that if there was a deficiency of fairness in the initial hearing, it was cured by the reconsideration hearing – Application for judicial review dismissed

AMALGAMATED TRANSIT UNION, LOCAL 113; RE TORONTO TRANSIT COMMISSION AND OLRB .... (Sept./Oct.) 982

Judicial Review – The Divisional Court issued a costs decision following the quashing of the Board's decision in this judicial review application - The applicant sought a costs award of $10,000 against the union and the Board – The court held that it does not assess costs, it fixes them, and in fixing costs, the key question the court asks is "what is the total for fees and disbursements that would be a fair and reasonable amount to be paid by the unsuccessful parties in the particular circumstances of this case?" – The court noted that labour relations cases in Divisional Court are generally held to low costs, possibly reflecting the absence of cost orders in labour arbitrations – The court saw no reason to move away from the traditional $3,000-5,000 range normally awarded in these applications – The court awarded $4,000 to the applicant, but did not require the Board to bear any of these costs, as it did nothing but make submissions as to the standard of review in its normal fashion

MAYSTAR GENERAL CONTRACTORS INC.; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1819 AND THE ONTARIO LABOUR RELATIONS BOARD .... (Jul./Aug.) 851

Jurisdictional Dispute – Construction Industry – Interim Relief – Reconsideration – Remedies – Strike – In the context of a jurisdictional dispute the Board issued an interim order, on reconsideration, assigning the disputed work to the Carpenters, after determining that the Labourers had engaged in strike activity designed solely to influence the assignment of work – The Board noted that the purpose of an interim order in a s. 99 context is to maintain the "status quo" pending the resolution of the application – The Board found that the "status quo" for the disputed work was that it had been performed exclusively by members of the Carpenters – The Board also noted, without deciding, that the Labourers claim to bargaining rights, and therefore a right to strike, at the project in question was problematic – The Board found that the Labourers had not negotiated or concluded any new collective agreements with the struck employers at the project – The only benefit that the Labourers had obtained as a result of the strike was an agreement from the constructor and two contractors to assign the disputed work only to subcontractors who employed members of Labourers – The Board therefore concluded that the sole purpose of the strike was to exert economic pressure on the constructor to assign the disputed work to the Labourers – The Board has consistently found that to engage in a strike in order to secure a work assignment is either unlawful or improper such that it will grant interim relief, whether or not the strike is otherwise lawful – The structure of the Act properly recognizes that pressing the issue of the assignment of particular work to impasse is undesirable, given its effect on the potential rights of parties outside the bargaining process – Such action tends to promote a similar strike response from the third-party union (as occurred in this case), rather than the resolution of the dispute under s. 99 without a work stoppage – The Board's interim order directing that the work be assigned to the Carpenters was not made effective until two weeks after the order, or when it would have been made but for the illegal response strike of the Carpenters – Matter continues

SNC-LAVALIN POWER ONTARIO 1409096 ONTARIO LIMITED C.O.B. AS PERI SCAFFOLDING AND ALUMA SYSTEMS CANADA INC.; RE CARPENTERS DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE LIUNA, LOCAL 506 ....(Jul./Aug.) 800

Jurisdictional Dispute – Construction Industry – Judicial Review – The Bricklayers brought an application for judicial review of the Board's decision finding that the employer's assignment of stone masonry work on the Victoria Memorial Museum Building in Ottawa to the Plasterers was correct – All parties agreed that the standard of review was patent unreasonableness when the Board deals with jurisdictional disputes – The court found that the Board "conducted a thorough and careful review of the factors that Board jurisprudence has evolved as relevant and helpful" and that there was a clear "line of reasoning leading to the conclusions reached" – Accordingly the decision was not patently unreasonable and the application was dismissed

IUBAC, LOCAL 7; RE OPERATIVE PLASTERERS, CEMENT MASONS, RESTORATION STEEPLEJACKS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, UNION LOCAL 598; RE COLONIAL BUILDING RESTORATION; RE LIUNA, LOCAL 527; RE 921879 ONTARIO LIMITED; RE MASONRY INDUSTRY EMPLOYERS COUNCIL OF ONTARIO; RE ONTARIO MASONRY CONTRACTORS ASSOCIATION..................... (Mar./Apr.) 454

Jurisdictional Dispute – Construction Industry – Remedies – *Trades Qualification and Apprenticeship Act* – The Ironworkers (IW) applied for a declaration and other relief under s. 99 of the Act in relation to hoisting and rigging of piping equipment weighing in excess of two tons carried out by members of the Plumbers and Pipefitters (UA) – The Board found that the majority of the area practice in respect of the work in dispute, when done by contractors bound by agreements with both unions, was assigned to either members of the IW exclusively or to a composite of UA and IW members – The Board further held that the two trade agreements to which the UA and IW were bound in the area remained in force, as they were not inconsistent with area practice – The Board found there was no material difference in terms of economy or efficiency to have UA rather than IW members perform the small amount of work involved, given that both UA and IW members were employed on the project – The Board rejected the UA's argument that s. 3 of O. Reg. 572/99 under the *Occupational Health and Safety Act* limited the performance of the hoisting and rigging work in question to the plumber and steamfitter trades – In doing so, the Board noted that the work that a plumber or steamfitter does is found in s. 1 of their respective trade regulations under the *Trades Qualification and Apprenticeship Act*, and neither regulation limits hoisting and rigging work to one particular trade – The Board found that included in the scope of the work of an IW is the moving and placing of machinery and heavy equipment, which is required in order to perform the work described in para 1 of the IW Regulation – The Board noted, however, that the work of the trades under the TQAA is not synonymous with a union's work jurisdiction – On the basis of the trade agreements, the Board held that the work was properly assigned to members of the IW – Although no provision of the Act specifically allows for a prospective order regarding work assignment, the Board held that s. 99(5) was broad enough to encompass such a power – The Board declared that the hoisting and rigging work in question should be assigned to IW members, and directed the employer to assign that work to them in future

TESC CONTRACTING COMPANY LTD. AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 800; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 786....................................(Jul./Aug.) 817

Jurisdictional Dispute – Construction Industry – The applicants alleged an improper assignment by Strabag of certain work at the Niagara Tunnel Project to members of the Labourers – The applicants asserted that tunneling work did not come within the exclusive purview of the Labourers and submitted that there were a number of other trades actively involved in tunneling work – The Board held that it was imperative to consider the context within which the work was undertaken – The Board was not persuaded that the assignment of the work in dispute by Strabag to members of the Labourers was wrong – Assigning the work associated with the construction of the tunnel to members of the Labourers was consistent with both the area practice and the practice of the electrical power systems sector and accorded with the recognized work jurisdiction of the Labourers – In particular, the existence of the "tunnel exception" in the EPSCA agreements and the incorporation of the tunnel schedule from the Heavy Engineering Association of Toronto collective agreement demonstrated that recognition – Applications dismissed

STRABAG INC.; ONTARIO POWER GENERATION; LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; LIUNA LOCAL 837; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL UNION 736; RE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO, CJA AND ITS LOCAL 1007; ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION .... (Sept./Oct.) 961

Jurisdictional Dispute – Construction Industry Grievance – Remedies – Following a finding that Bondfield had incorrectly assigned drywall taping work to the Painters in the Kingston area, the Bricklayers sought damages for the breach – The Board canvassed its jurisprudence in JD-related damage claims, where it asks: was the action of the employer substantively unreasonable or was there procedural unreasonableness in the employer's decision-making process? – In this case, the Board found that the assignment by Bondfield clearly violated two important factors that would constitute indicia of unreasonableness (an earlier Board decision; and area practice) – Bondfield argued that its actions were not unreasonable and, in any event, it was not the employer proper since it had subcontracted the taping work to Oakdale, a party bound exclusively to the Painters agreement – The Board held that a work assignment which flies in the face of an unequivocal earlier Board ruling involving the same three parties amounts to second guessing the Board decision and will not be countenanced; a claim for work on the basis of a Board decision in a JD is superior to other claims based on other factors – Grievance allowed; quantum of damages remitted to the parties

BONDFIELD CONSTRUCTION; RE BRICK AND ALLIED CRAFT UNION OF CANADA, LOCAL 10 AND INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 10 ....(May/June) 499

Jurisdictional Dispute – Construction Industry Grievance – The Sheet Metal Workers challenged the assignment of covers for columns in an office building atrium to the Carpenters – The Board determined that the dispute involved only 12 of 27 columns, because it centred on the air-handling features at the top of the particular columns – The unions agreed that each of them had the authority to perform the work, and that the Board's traditional criteria for resolving jurisdictional disputes for the most part were either not present or not helpful – The Board accepted the Carpenters' submission that it should therefore have regard to the practical realities of how the construction unfolded on a day-to-day basis – Since the erection and covering of the columns had been contracted to a drywall contractor in a bargaining relationship with the Carpenters, it would have been inefficient to import the Sheet Metal Workers and try to integrate them into the other construction work being carried out – The Board held that the work was properly assigned to the Carpenters, and the Sheet Metal Workers' grievance was dismissed

SMITH BROTHERS CONTRACTING CORP.; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 473; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION AND UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1946 .... (Sept./Oct.) 948

Jurisdictional Dispute – Judicial Review – Natural Justice – The Iron Workers claimed that Comstock wrongly assigned I-beam installation work to members of the UA –The Iron Workers referred to approximately 20 civil drawings in their reply submissions in order to demonstrate that the work in question belonged to it – The Board decided that it could not determine what weight ought to be given to the drawings – The Board found that the work in dispute was properly assigned to the UA – On judicial review, the Iron Workers argued that the Board had violated natural justice and procedural fairness by failing to consider the drawings – The Court found that the Board had considered the drawings but did not find them helpful to the resolution of the issue in its first decision; the Iron Workers had failed to raise the issue of the drawings in their request for reconsideration – Application for judicial review was dismissed

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 736; RE COMSTOCK CANADA LTD., UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 527, ONTARIO LABOUR RELATIONS BOARD, BRUCE POWER LP..(Nov./Dec.) 1197

Jurisdictional Dispute – Reconsideration – The Operating Engineers sought reconsideration of a Board decision confirming the assignment of the demolition of a highway overpass to the Labourers – The IUOE argued that members of a different Labourers local (than the one named in the JD) performed the work in dispute, and consequently the Operating Engineers were unfairly prejudiced in the Board's examination of employer and area practice – The Board held that it traditionally looks at the tradespeople performing the craft, not at representation rights – Similarly, the Board does not assess the skills and experience of individual workers assigned to a project, but looks to the propriety of the work assignment to the particular craft – Finally, the Board held that it was appropriate to consider the same project from both the employer practice and the area practice perspectives; these are different questions, and often the answers to them are not the same – Reconsideration denied

PRIESTLY DEMOLITION INC.; RE LIUNA, LOCAL 837; RE IUOE, LOCAL 793; RE ONTARIO ASSOCIATION OF DEMOLITION CONTRACTORS INC.. (Mar./Apr.) 419

Lock-Out – *Ambulance Services Collective Bargaining Act, 2001* – Essential Services Agreement – Interest Arbitration – Strike – The union and the employer entered into an essential service agreement pursuant to the *ASCBA* where the number of employees who must work during a strike or lock-out were the exact same number that would be employed in the normal course – The employer's application asked the Board to find that "no meaningful lock-out can occur" in the circumstances and to direct binding arbitration to settle the collective agreement, while the union's application asked the Board to find that the employer had breached the essential services agreement – The Board found that for a lock-out (or strike) to be "meaningful" it must permit "the application of economic sanctions in order to further and support the collective bargaining process" – Since no employees would be locked out as a result of the essential service agreement, the Board concluded that the essential service agreement between the parties effectively precludes the employer from engaging in a lock-out – Employer's application allowed; final and binding interest arbitration directed; union's application dismissed

SUN PARLOUR EMERGENCY SERVICES INCORPORATED (ESSEX DIVISION); RE SEIU, LOCAL 1.ON .... (Mar./Apr.) 447

Lock-out – Judicial Review – Natural Justice – Practice and Procedure – Reconsideration – Strike – The TTC brought an application for a declaration that its employees were about to engage in an illegal strike at the start-up of the morning shift – The Board provided notice to the union and counsel who normally acted for the union of a 5:30 a.m. hearing by conference call to deal with the application, leaving telephone messages and sending a facsimile to the union's office – The Board held that the union had been served with the application and had received notice of the hearing – The Board ordered the employees to cease and desist from any further engagement in the unlawful strike – The ATU alleged the TTC had illegally locked out its employees, and also sought reconsideration of the earlier cease and desist order (the Whitaker decision) – The Board held that no lock-out was taking place, and stated that the parties could have had their differences considered through the grievance and arbitration process – The Board also found that the illegal strike was continuing – The Board stated that even if it were to find that the union had not received notice of the earlier hearing, it was not appropriate to vary the Board's order – The union had full opportunity to make the submissions it would have been able to make earlier – Lock-out application dismissed; reconsideration of strike application denied – On the judicial review, the union took the position that the Board exceeded its jurisdiction by conducting an "expedited hearing", without authority and that natural justice was breached by proceeding without the union in the first hearing and by unfairly limiting the union's presentation time in the second hearing – The court noted that context is often the balancing ingredient when weighing the undeniable tension as among the tribunal's ability to control its process, the duty of fairness and the degree of deference courts should afford the exercise of the tribunal's discretion – The court found that the Board was not proceeding pursuant to its authority under section 110(18) and Rule 41, but rather pursuant to the abridgement provisions in its general Rules – In derogating from the norm through abridgement, the Board may only vary times, not eliminate them; it must give notice of a hearing, although it may vary the manner of doing so; it must conduct a hearing, although it may allow it to proceed electronically; it must allow the parties full opportunity to present evidence and make submissions, although it may direct how this is to be done, including orally or in writing, whether by evidence admissible in court of law or not – The court reviewed the factors to be applied in assessing the Board's duty of procedural fairness as set out in *Baker*, concluding that the Board merits a high degree of deference with respect to the fairness of its procedural decisions – The court found that the circumstances, in this case, were extreme and warranted quick intervention and that the Board's abridgement of times and procedures, and its finding of proper service and notice were appropriate in the context of the situation and did not operate as a breach of fairness – The court found nothing wrong with limiting the time for presentations in the second hearing and that the union had sufficient and fair opportunity to present its evidence and make its position clear – Finally, the court found that if there was a deficiency of fairness in the initial hearing, it was cured by the reconsideration hearing – Application for judicial review dismissed

AMALGAMATED TRANSIT UNION, LOCAL 113; RE TORONTO TRANSIT COMMISSION AND OLRB...(Sept./Oct.) 982

Status – Certification – Construction Industry – Employee – Practice and Procedure – The employer sought to remove two names from its list of employees at the Regional Certification meeting for one of two proffered reasons: either because they were performing work of a different craft or they were independent contractors – The Board refused to allow the employer to alter its list – The prejudice to the union in having to attempt to ascertain what work the employees were doing on an ordinary day two months earlier was significant and perhaps impossible to overcome – Secondly, the facts pleaded by the employer to establish independent contractor status were equivocal and therefore also prejudicial – Motion dismissed – Matter continues

MELANDI DRYWALL SYSTEM INC.; RE IUPAT, LOCAL 1891...............(Nov./Dec.) 1075

Membership Evidence – Certification – Construction Industry – Employee – Practice and Procedure – Reconsideration – In a request for reconsideration of a successful certification application where the employer had provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis – The handwriting expert determined that it was highly probable that the person who signed the affidavit had also earlier signed the membership evidence – The responding party submitted that the employee in question admitted that the signature on the membership card was his – Request for reconsideration withdrawn

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL...(Mar./Apr.) 396

Membership Evidence – Certification – Construction Industry – *Prima facie* motion – Practice and Procedure – Representation Vote – Unfair Labour Practice – The Company alleged that when employees signed membership cards they were confused and/or misled and did not realize what they were signing nor what the membership cards would be used for – First, the Board found that the allegations, even if true, do not breach s. 5 (the section cannot be violated); s. 15 (no particulars of employer domination); s. 70 (a union is not a "person" and was not acting as an "employer", hence it cannot violate the provision); or s. 76 (there was no "intimidation or coercion") – Accordingly, the Board dismissed the s. 96 complaint – Second, the Board found that these circumstances could give rise to the exercise of the Board's discretion to order a vote under s. 128.1(13)(b), even where the Union has more than 55% membership evidence, and accordingly, it dismissed the union's *prima facie* motion on this issue – Finally the Board refused to order disclosure of employee statements since the statements were covered by litigation privilege (collection of information by Company's counsel concerning what employees were doing on the date of application), and the balancing of competing interests also led to that conclusion – That is, since the information recorded in the statements would be given little, if any, weight (they were collected three to five weeks after the date of application), the potential undermining of the adversarial litigation process (by ordering the disclosure) outweighed any potential value that these statements had – Unfair Labour Practice complaint dismissed – Certification application continues

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486......................(Nov./Dec.) 1079

Membership Evidence – Certification – Practice and Procedure – Reconsideration – In the context of a reconsideration of a certification application where the trade union provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis – As the request for reconsideration was proceeding to hearing, the union sought the Board's permission to disclose to the employer the identity of the person whose signature was challenged – Disclosure granted – Matter continues

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..(Jan./Feb.) 125

Natural Justice – Certification – Construction Industry – Evidence – Judicial Review –Practice and Procedure – Reconsideration – The Carpenters moved to set aside the decision of a single judge of Divisional Court permitting the employer to rely on an affidavit in support of its judicial review application of the Board's certification decision (see [2006] OLRB Rep. September/October 756) – A full panel of the Divisional Court held that the motions judge was not "clearly wrong" in concluding that one paragraph of the affidavit ought to be received by the reviewing panel in support of the employer's allegation that it was denied natural justice by the Board – The balance of the affidavit, however, should be struck because it contains material not before the Board and it is clear the Board's decision was rendered on the basis of evidence before it – The "new evidence" foundation for judicial review cannot succeed – Motion allowed in part

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND ONTARIO LABOUR RELATIONS BOARD ....(Jan./Feb.) 249

Natural Justice – Judicial Review – Lock-out – Practice and Procedure – Reconsideration – Strike – The TTC brought an application for a declaration that its employees were about to engage in an illegal strike at the start-up of the morning shift – The Board provided notice to the union and counsel who normally acted for the union of a 5:30 a.m. hearing by conference call to deal with the application, leaving telephone messages and sending a facsimile to the union's office – The Board held that the union had been served with the application and had received notice of the hearing – The Board ordered the employees to cease and desist from any further engagement in the unlawful strike – The ATU alleged the TTC had illegally locked out its employees, and also sought reconsideration of the earlier cease and desist order (the Whitaker decision) – The Board held that no lock-out was taking place, and stated that the parties could have had their differences considered through the grievance and arbitration process – The Board also found that the illegal strike was continuing – The Board stated that even if it were to find that the union had not received notice of the earlier hearing, it was not appropriate to vary the Board's order – The union had full opportunity to make the submissions it would have been able to make earlier – Lock-out application dismissed; reconsideration of strike application denied – On the judicial review, the union took the position that the Board exceeded its jurisdiction by conducting an "expedited hearing", without authority and that natural justice was breached by proceeding without the union in the first hearing and by unfairly limiting the union's presentation time in the second hearing – The court noted that context is often the balancing ingredient when weighing the undeniable tension as among the tribunal's ability to control its process, the duty of fairness and the degree of deference courts should afford the exercise of the tribunal's discretion – The court found that the Board was not proceeding pursuant to its authority under section 110(18) and Rule 41, but rather pursuant to the abridgement provisions in its general Rules – In derogating from the norm through abridgement, the Board may only vary times, not eliminate them; it must give notice of a hearing, although it may vary the manner of doing so; it must conduct a hearing, although it may allow it to proceed electronically; it must allow the parties full opportunity to present evidence and make submissions, although it may direct how this is to be done, including orally or in writing, whether by evidence admissible in court of law or not – The court reviewed the factors to be applied in assessing the Board's duty of procedural fairness as set out in *Baker*, concluding that the Board merits a high degree of deference with respect to the fairness of its procedural decisions – The court found that the circumstances, in this case, were extreme and warranted quick intervention and that the Board's abridgement of times and procedures, and its finding of proper service and notice were appropriate in the context of the situation and did not operate as a breach of fairness – The court found nothing wrong with limiting the time for presentations in the second hearing and that the union had sufficient and fair opportunity to present its evidence and make its position clear – Finally, the court found that if there was a deficiency of fairness in the initial hearing, it was cured by the reconsideration hearing – Application for judicial review dismissed

AMALGAMATED TRANSIT UNION, LOCAL 113; RE TORONTO TRANSIT COMMISSION AND OLRB.. (Sept./Oct.) 982

Natural Justice – Jurisdictional Dispute – Judicial Review – The Iron Workers claimed that Comstock wrongly assigned I-beam installation work to members of the UA –The Iron Workers referred to approximately 20 civil drawings in their reply submissions in order to demonstrate that the work in question belonged to it – The Board decided that it could not determine what weight ought to be given to the drawings – The Board found that the work in dispute was properly assigned to the UA – On judicial review, the Iron Workers argued that the Board had violated natural justice and procedural fairness by failing to consider the drawings – The Court found that the Board had considered the drawings but did not find them helpful to the resolution of the issue in its first decision; the Iron Workers had failed to raise the issue of the drawings in their request for reconsideration – Application for judicial review was dismissed

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 736; RE COMSTOCK CANADA LTD., UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 527, ONTARIO LABOUR RELATIONS BOARD, BRUCE POWER LP...(Nov./Dec.) 1197

Natural Justice –Alteration of Jurisdiction – Construction Industry – Judicial Review – Practice and Procedure – The Local alleged that the Board's decision, finding just cause for the International to assume jurisdiction of the Local over a computer centre construction project in Barrie, should be quashed on a number of grounds – The Board, noting that s. 147(5) operated to stay the assumption of the Local's jurisdiction, was concerned that a full hearing might render the result inconsequential and moot, sine the project was near completion held a two day consultation in accordance with Rule 41, as the situation required a speedy resolution – The Board, having acknowledged that there were facts in dispute, determined there was sufficient uncontested material to permit it to reach an appropriate decision – The Board fashioned a specific remedy placing restrictions and conditions on the International's transfer of jurisdiction – On judicial review, the court first found that Rule 41 was not *ultra vires*, since there was no improper delegation of authority by the Chair, nor was the rule inconsistent with the scheme of the Act – The court found that the rule sets a standard that must be met before a Vice Chair may exercise their discretion in the circumstances of a particular case, and that the Rule is entirely consistent while noting that the Board "operates in a complex, dynamic, and highly fluid environment where expeditious rulings and informal and accessible procedures are often essential to maintaining the delicate balance between the parties' various interests" – Second, the court found that the Board did not deny the Local natural justice by proceeding with a consultation rather than a full hearing, since the core value embraced by the *audi alteram partem* maxim was met by the Board: providing the parties with an opportunity to be heard – The court also found it was not patently unreasonable for the Board to have chosen this procedure, since the Board was given the authority to balance the need for complete natural justice on the one hand against expedition on the other – Third, the court found that the Board did not exceed its jurisdiction by making findings of fact in the absence of any evidence, since there was evidence before it, the sufficiency and weight of which were within its exclusive jurisdiction, permitting it to make its decision – Fourth, the court found that the Board did not deny natural justice by failing to provide adequate reasons, since it provided a sufficiently adequate explanation of the process it engaged in, the conclusions it reached, on what it founded those conclusions and the results of its conclusions – Finally the court found that the Board's decision on the merits was not patently unreasonable: it was a sound and sensible decision in circumstances of acrimony that permitted the appropriate labour relations objective to be achieved, with the least intrusion on the rights of the Local's members – Application dismissed

IBEW, LOCAL 1739; RE GUILD ELECTRIC LIMITED; RE OLRB ....(May/June) 669

Non-Construction Employer – Certification – Construction Industry – The Labourers filed two applications for certification simultaneously (industrial and construction), seeking to represent the employees of ReNu engaged in the dismantling and removal of metal fixtures at a moribund steel manufacturing facility – The Board found that the predominant nature of the work the employees were performing was "demolition" and therefore construction – Secondly, the Board examined whether ReNu could qualify for the non-construction employer exemption – The Board found that ReNu was not performing construction work for which it could expect compensation from a third party; rather, ReNu was salvaging the metal and reselling it as part of the salvage operations – Application for construction certification dismissed – Non-Construction employer status granted – Application for industrial certification referred to Manager of Field Services to count ballots

RENU RECYCLING INC.; RE LIUNA LOCAL 837. ....(Jan./Feb.) 177

Order for Productions – Contempt – Consent to Prosecute – Practice and Procedure – Related Employer – Sale of a Business – In the context of a s. 69/1(4) application, the Board issued a Confidentiality Order pertaining to documents produced by the responding parties – The responding parties subsequently alleged that the union breached the Confidentiality Order – The union argued the Board had no jurisdiction to consider such a breach – Dealing only with jurisdiction, the Board found that the issue of the breach and enforcement of Orders is one of mixed fact and law and, as such, falls within its jurisdiction – The Board noted that a part of its practice and procedure includes the power to compel the production of documents and to grant Orders protecting the confidentiality of such documents – The Board further noted that if it could not make determinations regarding a possible breach of a Confidentiality Order, such orders would be rendered meaningless – The Board rejected the union's contention that the responding parties had not provided sufficient particulars of their allegations, and that the Board's consideration of the issue would result in undue delay and a waste of the Board's time – The Board found that the fact that it may state a case to the Divisional Court for contempt or may grant a consent to prosecute merely confirms the Board's jurisdiction to consider the issue – Matter continues

KIMBERLY-CLARK CORPORATION AND KIMBERLY-CLARK INC.; NEENAH PAPER, INC. AND NEENAH PAPER COMPANY OF CANADA; BUCHANAN FOREST PRODUCTS LTD., TERRACE BAY PULP INC. AND EAGLE LOGGING INC.; RE UNITED STEELWORKERS LOCAL 1-2693....................................(Jul./Aug.) 765

Order for Productions – Duty of Fair Representation – Duty of Fair Referral – The employee brought an application alleging a breach of the union's duty of fair representation and its duty of fair referral – The Board held that while the applicant alleged a number of misdeeds on the part of union officials in the course of internal union proceedings involving him, none were alleged in the context of his employment relationship as a bargaining unit employee with an employer bound to the collective agreement – As a result, the Board dismissed the s. 74 application for failure to disclose a *prima facie* case – The Board held that the s. 75 application should proceed because the applicant had been suspended as a union member thereby removing him from the hiring hall list – Since the applicant suggested that his suspension was improperly motivated, an explanation will be required from the union regarding its motivations and thought processes for having suspended the applicant – On this point, as the Board stated in *Danillo Buttazzoni*, [2004] OLRB Rep. May/June 499, it would not entertain arguments about the procedural aspects of, or adherence to, a trade union's constitution by the union's decision-makers who determined the expulsion or suspension of the member – The Board also ordered that the union provide the applicant with copies of its work assignment records in order to confirm or deny his claim that more junior employees were given work assignments while he was bypassed – Matter continues

DUDLEY WRIGHT; RE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, LOCAL 873...(Sept./Oct.) 862

Parties – Collective Bargaining – Construction Industry – Duty to Bargain in Good Faith – Intervenors – Unfair Labour Practice – Three of five constituent member associations of PEBAL filed a complaint alleging the LEBA together with the other two constituent members of PEBAL breached s. 17 of the Act – The applicants allege that LEBA and the two other constituent members, by entering into agreements extending the scope of their appendices and subcontracting provisions, have forced a recognition issue to impasse, since PEBAL cannot adopt an agreement entered into by some members that has a direct negative impact on its other members – The Board found that just as there is no duty to bargain in good faith owed to employees, there is no duty owed to the constituent members of PEBAL – The Board further noted that while it is charged with determining the applications or complaints that are filed with it, the Board must be satisfied the applicants do not just have an interest in the matter, but have the legal right to proceed with the complaint – Here the Board found since there is no duty on LEBA to bargain in good faith with the constituent members of PEBAL, the applicants do not have the legal right to assert that LEBA violated the duty to bargain in good faith owed to PEBAL – Finally the Board characterized this matter as one of a complaint about the manner in which two of the five constituent members of PEBAL have dealt with the other three members (and how LEBA has taken advantage of this schism), and not as one encompassed by s. 17 of the Act – Application dismissed

ONTARIO MASONRY CONTRACTORS ASSOCIATION; RE CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF ONTARIO; RE SEALANT AND WATERPROOFING ASSOCIATION; RE INDUSTRIAL CONTRACTORS ASSOCIATION OF CANADA; RE CONCRETE FLOOR CONTRACTORS ASSOCIATION OF ONTARIO..(May/June) 600

Parties – Collective Bargaining – Construction Industry – Interference with employers' organization – Intervenors – Unfair Labour Practice – Three of five constituent member associations of PEBAL filed a complaint alleging the LEBA together with the other two constituent members of PEBAL interfered in the administration of the employers' organization contrary to s. 71 of the Act – The Board ruled on four preliminary motions raised by the responding parties – First, the Board found that the members of the employers' organization had a direct legal interest in having their organization operate without interference by a trade union and accordingly had standing – Second, the Board declined to determine whether the applicants had pled a *prima facie* case and dismissed the responding parties' motion to dismiss – Third the Board declined to exercise its discretion to refuse to entertain the complaint – Finally, the Board found merit in the responding parties' submissions seeking to defer the matter pending the outcome of an Industrial Inquiry Commission, given that through its mandate the Commission would provide a much better forum for discussing the parties' differences – Adjourned pending release of Commission's report

ONTARIO MASONRY CONTRACTORS ASSOCIATION; RE CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF ONTARIO; RE SEALANT AND WATERPROOFING ASSOCIATION; RE INDUSTRIAL CONTRACTORS ASSOCIATION OF CANADA; RE CONCRETE FLOOR CONTRACTORS ASSOCIATION OF ONTARIO..(May/June) 607

Parties – Construction Industry – Judicial Review – Related Employer – Sale of Business – Settlement – The Council brought a motion to quash the judicial review, characterizing it as prematurely seeking a review of an interim decision of the Board – In the 69/1(4) application the responding party employers brought a motion to the Board to dismiss the application because of Minutes of Settlement purporting to bind the Council and any of its affiliates from bringing such applications for ten years – The Board found that although the individual who signed the agreement on behalf of Local 586 was also the President of the Council there was no evidence that he had actual or ostensible authority to bind the Council – The Board dismissed the employers' motion and the sale of business/related employer applications continued before the Board, although the hearing on the merits had not yet commenced – The employers filed for judicial review –The court found this to be an exceptional or extraordinary situation that should properly be reviewed prior to the Board dealing with the merits – The court also assisted the parties in providing affidavit evidence to reflect the evidence that was before the Board

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO .... (Jan./Feb.) 284

Practice and Procedure – Certification – A dispute arose with respect to the status of certain individuals in this certification application – The parties had refused to sign the Certification Worksheet following the Regional Certification meeting - The Board outlined the importance of recording parties' agreement at various points in the certification process, and its expectation that parties will affix their signatures to the worksheet in recognition of their confirmed positions – The absence of a signature on the worksheet will not preserve a unilateral right to later change or add to a position – Submissions directed

PACE ENTERPRISES (1998) INC.; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS DRYWALL AND ALLIED WORKERS UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA .... (Mar./Apr.) 410

Practice and Procedure – Certification – Construction Industry – Employee – Membership Evidence – Reconsideration – In a request for reconsideration of a successful certification application where the employer had provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis – The handwriting expert determined that it was highly probable that the person who signed the affidavit had also earlier signed the membership evidence – The responding party submitted that the employee in question admitted that the signature on the membership card was his – Request for reconsideration withdrawn

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.. (Mar./Apr.) 396

Practice and Procedure – Construction Industry – Termination – Timeliness – The application was received by the Board on May 4, 2007, having been delivered to a courier on May 2, 2007 – The Board held that as a rule an application is filed on the day the Board actually receives it, the only exception occurring in the construction industry where certifications and terminations given to Priority Courier will be deemed to have been filed on the date they were given to the courier (Rule 24.2) – The applicant in the present case gave his application to a different courier – The Board was not prepared to extend the exception beyond the one contemplated in the Rules – Application dismissed

YORKWOOD HOMES; RE MARK JONES; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183...(May/June) 667

Practice and Procedure – Abuse of Process – Employment Standards – In this employee application for review, the Board had issued earlier decisions describing the applicant's inappropriate, disrespectful and disruptive behaviour – Ultimately the Board was forced to cut short a hearing day because of the employee's conduct, and seek submissions from the parties as to how to proceed – The employer argued that to continue would be an abuse of process, the applicant had not pleaded a *prima facie* case or, alternatively, the applicant should provide a medical assessment of his ability to proceed – The applicant sought the Vice-Chair's recusal, an order from the Board admonishing employer counsel's behaviour, and a broader investigation into his employment and discharge (including reprisal) – The Board refused to step down, confirmed that employer counsel's conduct had been courteous and restrained, and held that the breadth of the issues before it already encompassed the remedies the applicant was seeking – The Board terminated the hearing and dismissed the application because of the applicant's conduct

NOVAFLOW SYSTEMS INC.; RE OMER A. EL SAYED AND DIRECTOR OF EMPLOYMENT STANDARDS ....(Jan./Feb.) 130

Practice and Procedure – Bargaining Rights – Employer Initiation – Termination – The employer argued that the trade union should be precluded from alleging a violation of s. 63(16) because it failed to particularize the impugned conduct in a timely way – The Board upheld the employer's position, stating that the union must engage in due diligence to articulate its position as promptly as possible, in accordance with the Board's Rules – This failure of due diligence (a delay of over three months) caused the Board to deny the union the opportunity to lead evidence relating to employer initiation – Matter continues

WALLS.COM INC.; RE DARREN CATES; RE THE CARPENTER'S DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTER'S AND JOINERS OF AMERICA AND ITS LOCAL 494 AND CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL AND GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL & ALLIED WORKERS AND UNITED BROTHERHOOD OF CARPENTER'S AND JOINTERS OF AMERICA; AND THE FOLLOWING LOCAL UNIONS; 18, 27, 93, 249, 397, 446, 494, 675, 785, 1256, 1669, 1946, 1988, 2041, 2222 AND 2486 ....(Nov./Dec.) 1179

Practice and Procedure – Certification – Construction Industry – Evidence – Judicial Review – Natural Justice – Reconsideration – The Carpenters moved to set aside the decision of a single judge of Divisional Court permitting the employer to rely on an affidavit in support of its judicial review application of the Board's certification decision (see [2006] OLRB Rep. September/October 756*)* – A full panel of the Divisional Court held that the motions judge was not "clearly wrong" in concluding that one paragraph of the affidavit ought to be received by the reviewing panel in support of the employer's allegation that it was denied natural justice by the Board – The balance of the affidavit, however, should be struck because it contains material not before the Board and it is clear the Board's decision was rendered on the basis of evidence before it – The "new evidence" foundation for judicial review cannot succeed – Motion allowed in part

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND ONTARIO LABOUR RELATIONS BOARD ....(Jan./Feb.) 249

Practice and Procedure – Certification – Construction Industry – The responding party delivered its response to the union in a timely way, but failed to file a timely response with the Board since it had not realized that its facsimile report read "Busy, no response" and was not received by the Board – The Board followed the Divisional Court's decision in *Maystar* and decided to exercise its discretion to allow the late filing on three grounds: the union consented; the union was not prejudiced since they had received the response in a timely way; and when the respondent was informed of the problem they immediately filed their response – Matter continues

GAGNON DEMOLITION INC.; RE LIUNA, LOCAL 625............................(Mar./Apr.) 358

Practice and Procedure – Certification – Construction Industry – Timeliness – The Board finds that in a card-based application for certification, there is no prejudice to the union if the responding party fails to provide the response to the union at the same time it files it with the Board – The response was delivered to the applicant one week after it was due – The Board relieves against the late delivery of the response – Matter continues

LEMMO MASONRY INC.; RE LIUNA LOCAL 527......................................(May/June) 584

Practice and Procedure – Certification – Construction Industry – Employer – Related Employer – Timeliness – The Board found nothing wrong with the application naming three possible employers as responding parties: the applicant specifically referenced subsection 1(4) and asked that the certificate name all three entities – The responding party filed its response five days late but asked the Board to exercise its discretion to accept the late-filed information in accordance with the ruling of the Divisional Court in *Maystar* (see [2007] OLRB Rep. March/April 459) – The Board examined possible criteria for the exercise of discretion: the nature of certification applications and the need for speed in their determination; the reasons for the late filing; prejudice to the applicant – The Board finds that prejudice is present in every case, and will be the same in every case – In the circumstances of this case, the Board does not exercise its discretion to accept the late-filed information – The applicant delivered its materials to three fax machines for the three employers; personal delivery is not a requirement of the Act or the Board's Rules – Time extension allowed for response to related employer allegations – Matter continues

REIDS UPTOWN HOMES, REIDCO NORTH LTD., S.R. PROPERTIES INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL............................(May/June) 633

Practice and Procedure – Certification – Construction Industry – Status – Timeliness – The respondent employer sought to add an employee to the bargaining unit two weeks after the application for certification was first filed – The Board held that the Divisional Court's ruling in *Maystar* [2007] OLRB Rep. March/April 459 regarding the Board's discretion to consider late evidence filed by a responding party applies to these circumstances – The Board noted that the ability of a trade union to determine what tasks an employee performed on the date of application "diminishes by the hour," but that prejudice to the union as a result of late filing of information will not result in every case – The Board held that the two-week delay in notifying the Board coupled with a failure to notify the union earlier would result in prejudice to the union if the employee was included on the list – The Board rejected the argument that the employer could act as a proxy for the employee holding that there was an adequate process for the employee to assert his right to participate – The Board also held that it is not for the employer to raise the rights and interests of an employee, particularly where the employee himself has not sought to assert that he is an employee in the bargaining unit – The Board denied the request of the respondent to add the employee to the list – Matter continues

STRUCT-CON CONSTRUCTION LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..(Jul./Aug.) 810

Practice and Procedure – Certification – Construction Industry – Representation Vote – Unfair Labour Practice – LIUNA filed membership evidence in excess of 55% in support of this card-based application for certification – The responding party alleged that the union had acted improperly in its collection of membership evidence by assuring the employees they were only signing cards to get a vote and by advising the employees that the employer was supportive of the union – Further, a number of employees wrote to the Board stating that they did not wish to belong to the union, and requesting a representation vote – The Board ruled that the fact an employee signed a membership card but later had a change of heart would be irrelevant to the exercise of its discretion in certifying the union – The Board was concerned, however, about the employer's allegations and considered its options: to certify the union, to order a vote, or to dismiss the application – The Board determined that it should set the matter down for hearing to hear evidence about the allegations attributed to the union's organizers - Matter listed for hearing

HILLSIDE SOD LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .... (Nov./Dec.) 1037

Practice and Procedure – Certification – Construction Industry – Where the responding party makes specific allegations about improper statements having been made by the applicant's representatives during the collection of membership evidence, the Board's Rules require that the applicant be advised of the dates, places and times the alleged statements were made, but the disclosure of the names of the people to whom the alleged statements were made was not required to be produced – Application continues

HILLSIDE SOD LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .... (Nov./Dec.) 1040

Practice and Procedure – Certification – Construction Industry – Employee – Status – The employer sought to remove two names from its list of employees at the Regional Certification meeting for one of two proffered reasons: either because they were performing work of a different craft or they were independent contractors – The Board refused to allow the employer to alter its list – The prejudice to the union in having to attempt to ascertain what work the employees were doing on an ordinary day two months earlier was significant and perhaps impossible to overcome – Secondly, the facts pleaded by the employer to establish independent contractor status were equivocal and therefore also prejudicial – Motion dismissed – Matter continues

MELANDI DRYWALL SYSTEM INC.; RE IUPAT, LOCAL 1891 .... (Nov./Dec.) 1075

Practice and Procedure – Certification – Construction Industry – Membership Evidence – *Prima facie* motion – Representation Vote – Unfair Labour Practice – The Company alleged that when employees signed membership cards they were confused and/or misled and did not realize what they were signing nor what the membership cards would be used for – First, the Board found that the allegations, even if true, do not breach s. 5 (the section cannot be violated); s. 15 (no particulars of employer domination); s. 70 (a union is not a "person" and was not acting as an "employer", hence it cannot violate the provision); or s. 76 (there was no "intimidation or coercion") – Accordingly, the Board dismissed the s. 96 complaint – Second, the Board found that these circumstances could give rise to the exercise of the Board's discretion to order a vote under s. 128.1(13)(b), even where the Union has more than 55% membership evidence, and accordingly, it dismissed the union's *prima facie* motion on this issue – Finally the Board refused to order disclosure of employee statements since the statements were covered by litigation privilege (collection of information by Company's counsel concerning what employees were doing on the date of application), and the balancing of competing interests also led to that conclusion – That is, since the information recorded in the statements would be given little, if any, weight (they were collected three to five weeks after the date of application), the potential undermining of the adversarial litigation process (by ordering the disclosure) outweighed any potential value that these statements had – Unfair Labour Practice complaint dismissed – Certification application continues

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486......................(Nov./Dec.) 1079

Practice and Procedure – Certification – Construction Industry – In a card-based certification application the employer responded over two weeks late, giving as a reason that the owner's first language was not English and that he did not understand the documents – The Board exercised its discretion to permit the employer's late filed information concerning one issue (whether two persons were independent contractors), but refused to grant it with respect to the other (whether the employer may add someone to the list) – On the first issue the Board found the delay would not significantly prejudice the union since the information—nature of the relationship—was not time sensitive; whereas the latter point, whether someone was at work on the day of application, would cause significant prejudice to the union given the company's delay – Matter continues

VICTOR CHADI o/a VICTOR HUGO DRYWALL; RE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA..(Nov./Dec.) 1168

Practice and Procedure – Certification – Membership Evidence – Reconsideration – In the context of a reconsideration of a certification application where the trade union provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis – As the request for reconsideration was proceeding to hearing, the union sought the Board's permission to disclose to the employer the identity of the person whose signature was challenged – Disclosure granted – Matter continues

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL...(Jan./Feb.) 125

Practice and Procedure – Certification – Related Employer – Remedies – Unfair Labour Practice – The Labourers filed an application to represent the employees of Postma, seeking remedial certification as well as a declaration that Postma and Specific are a single employer – As a further remedy for Postma's alleged unfair labour practice (one of Postma's owners had advocated a preference for CLAC over the Labourers in the days prior to the representation vote), the Labourers asked the Board to terminate CLAC's bargaining rights with Specific – The Board held that the revocation of a union's bargaining rights is an extreme remedy, to be invoked only in the most serious cases of wrongdoing – In the instant case, the Labourers were asking the Board to revoke CLAC's bargaining rights in the absence of any suggestion of wrongdoing by CLAC; CLAC was the innocent beneficiary of wrongdoing committed by Postma – The Board made a preliminary determination that it would not order the termination of CLAC's bargaining rights with Specific – Matter continues

1614818 ONTARIO INC c.o.b. POSTMA CONCRETE FORMING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 53 AFFILIATED WITH CHRISTIAN LABOUR ASSOCIATION OF CANADA .... (Mar./Apr.) 297

Practice and Procedure – Certification – Representation Vote – An application for certification was filed on August 22, 2006 – On March 15, 2007, the trade union accepted the employer's s. 8.1 challenge and, on the same date, filed a second application for certification – The employer argued that the second application should be barred pursuant to s. 111(3)(c) of the Act, s. 7(10) of the Act, or s. 111(2)(k) of the Act – In the alternative, the employer argued that the union should be precluded from challenging the inclusion of certain employees that had been included in the first application for certification and which had been agreed to on March 15, 2007 – The Board addressed each of the employer's arguments: (1) there is no basis to depart from the Board's usual practice of postponing consideration of a subsequent application until a final decision has been issued on the original application; (2) s. 7(10) does not apply since the application was not withdrawn; rather, the union accepted the employer's s. 8.1 objection, requiring the Board to dismiss the application under s. 8.1(5)7; and (3) the Board will generally only impose a bar when there have been successive unsuccessful applications or where the wishes of the employees have not been decisively tested in a representation vote – There had been no decisive testing or successive applications and the Board declined to exercise its discretion to dismiss the second application for certification – Finally, the Board held that voter eligibility must be determined on the date of the application for certification – Neither party is bound to lists of eligible voters by virtue of positions previously taken in a different application – First application dismissed – Second application continues

WILLIAM DAY CONSTRUCTION LIMITED RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 .... (Nov./Dec.) 1183

Practice and Procedure – Certification – Unfair Labour Practice – CLAC applied to certify the employees of the employer pursuant to s. 128.1 – Six days later the Labourers intervened in the CLAC application, filed a certification application under s. 8, as well as an unfair labour practice against CLAC and the employer – The Board found there was nothing objectionable in CLAC filing a certification that was in part a displacement and in part a fresh application for a group of unrepresented employees – Secondly, since CLAC was unaware of the Labourers' bargaining rights in the ICI sector, the Board held CLAC was not obliged to identify the other union in its application – The Board then considered s. 111(3) of the Act and the factors relevant to its exercise of discretion in applying that section, including: the ability to ascertain the true wishes of the employees; whether there are overlapping bargaining units; the potential complexities of the vote arrangements; the significance of the application date in the construction industry; the desire to avoid protracted litigation; the timing of the second application; the promotion of harmonious labour relations; and the existence of the outstanding unfair labour practice complaint – The Board found that since the Labourers filed their intervention in the CLAC application on the same day as their own certification (and the intervention was found to be timely by a different panel of the Board), and since no significant steps had been taken in the card-based certification at that point, it would exercise its discretion to treat the applications as having been filed on the same day – Matter continues

CONCRETE SYSTEMS INC.; RE CONSTRUCTION WORKERS LOCAL 53, AFFILIATED WITH CHRISTIAN LABOUR ASSOCIATION OF CANADA; RE LIUNA, LOCAL 1089 .... (Jul./Aug.) 722

Practice and Procedure – Contempt – Consent to Prosecute – Order for Productions – Related Employer – Sale of a Business – In the context of a s. 69/1(4) application, the Board issued a Confidentiality Order pertaining to documents produced by the responding parties – The responding parties subsequently alleged that the union breached the Confidentiality Order – The union argued the Board had no jurisdiction to consider such a breach – Dealing only with jurisdiction, the Board found that the issue of the breach and enforcement of Orders is one of mixed fact and law and, as such, falls within its jurisdiction – The Board noted that a part of its practice and procedure includes the power to compel the production of documents and to grant Orders protecting the confidentiality of such documents – The Board further noted that if it could not make determinations regarding a possible breach of a Confidentiality Order, such orders would be rendered meaningless – The Board rejected the union's contention that the responding parties had not provided sufficient particulars of their allegations, and that the Board's consideration of the issue would result in undue delay and a waste of the Board's time – The Board found that the fact that it may state a case to the Divisional Court for contempt or may grant a consent to prosecute merely confirms the Board's jurisdiction to consider the issue – Matter continues

KIMBERLY-CLARK CORPORATION AND KIMBERLY-CLARK INC.; NEENAH PAPER, INC. AND NEENAH PAPER COMPANY OF CANADA; BUCHANAN FOREST PRODUCTS LTD., TERRACE BAY PULP INC. AND EAGLE LOGGING INC.; RE UNITED STEELWORKERS LOCAL 1-2693..................................(Jul./Aug.) 765

Practice and Procedure – Duty of Fair Representation – Health and Safety – The Board found that these two applications arose from similar facts at the workplace, and directed that they be heard together; further, the Board held that rulings made in the first application that pertain to the same facts or legal issues would be binding on the parties in the second application – The applicant alleged that he raised serious health and safety concerns about his workplace with his employer, his union and the Ministry of Labour, and that the responses and results arising from his complaints were unsatisfactory – The Board found that the union had acted properly: it participated in his reassignment when he invoked a work refusal; it took an active role in the Ministry investigations of air quality in the workplace, and it filed a grievance on the applicant's behalf when he was denied short-term assistance – Application dismissed – Second matter to be scheduled for hearing

JEREMY WOODCOCK; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ON BEHALF OF ITS LOCAL 6571; RE RONALD GOODCHILD; RE GERDAU AMERISTEEL INC. .... (Mar./Apr.) 390

Practice and Procedure – Evidence – Health and Safety – The Board ruled on the admissibility of evidence in this health and safety appeal (for a history of the matter, see [2006] OLRB Rep. September/October 648) – The Board held that since the orders under appeal dated from 2002, only the evidence available before the issuance of the orders would be admissible – To allow the inclusion of subsequent events could condone conduct that, absent the appeal, would have constituted a contravention of the Act – Since no orders were issued regarding work done after 2002, the Board had no authority to adjudicate what happened after that date – Matter continues

1353837 ONTARIO INC./LAWRENCE RYAN; RE PETER MARTIN AND JOHN DENNIS, INSPECTORS...(May/June) 481

Practice and Procedure – Judicial Review – Lock-out – Natural Justice – Reconsideration – Strike – The TTC brought an application for a declaration that its employees were about to engage in an illegal strike at the start-up of the morning shift – The Board provided notice to the union and counsel who normally acted for the union of a 5:30 a.m. hearing by conference call to deal with the application, leaving telephone messages and sending a facsimile to the union's office – The Board held that the union had been served with the application and had received notice of the hearing – The Board ordered the employees to cease and desist from any further engagement in the unlawful strike – The ATU alleged the TTC had illegally locked out its employees, and also sought reconsideration of the earlier cease and desist order (the Whitaker decision) – The Board held that no lock-out was taking place, and stated that the parties could have had their differences considered through the grievance and arbitration process – The Board also found that the illegal strike was continuing – The Board stated that even if it were to find that the union had not received notice of the earlier hearing, it was not appropriate to vary the Board's order – The union had full opportunity to make the submissions it would have been able to make earlier – Lock-out application dismissed; reconsideration of strike application denied – On the judicial review, the union took the position that the Board exceeded its jurisdiction by conducting an "expedited hearing", without authority and that natural justice was breached by proceeding without the union in the first hearing and by unfairly limiting the union's presentation time in the second hearing – The court noted that context is often the balancing ingredient when weighing the undeniable tension as among the tribunal's ability to control its process, the duty of fairness and the degree of deference courts should afford the exercise of the tribunal's discretion – The court found that the Board was not proceeding pursuant to its authority under section 110(18) and Rule 41, but rather pursuant to the abridgement provisions in its general Rules – In derogating from the norm through abridgement, the Board may only vary times, not eliminate them; it must give notice of a hearing, although it may vary the manner of doing so; it must conduct a hearing, although it may allow it to proceed electronically; it must allow the parties full opportunity to present evidence and make submissions, although it may direct how this is to be done, including orally or in writing, whether by evidence admissible in court of law or not – The court reviewed the factors to be applied in assessing the Board's duty of procedural fairness as set out in *Baker*, concluding that the Board merits a high degree of deference with respect to the fairness of its procedural decisions – The court found that the circumstances, in this case, were extreme and warranted quick intervention and that the Board's abridgement of times and procedures, and its finding of proper service and notice were appropriate in the context of the situation and did not operate as a breach of fairness – The court found nothing wrong with limiting the time for presentations in the second hearing and that the union had sufficient and fair opportunity to present its evidence and make its position clear – Finally, the court found that if there was a deficiency of fairness in the initial hearing, it was cured by the reconsideration hearing – Application for judicial review dismissed

AMALGAMATED TRANSIT UNION, LOCAL 113; RE TORONTO TRANSIT COMMISSION AND OLRB.. (Sept./Oct.) 982

Practice and Procedure – Termination – Timeliness – This application under s. 66 of the Act, was filed one year to the date of the signing of the voluntary recognition agreement – The responding party argued that it was out of time, and that the applicant was not at work in the bargaining unit on the date of application – The Board found that an application under s. 66 of the Act does not fall within the construction provisions of the Board's Rules, so Rule 3.4 applies, rather than Rule 24.2 – The applicant used the services of a private courier (not Priority Post), so the application date was the date the materials were received by the Board – The applicant was on leave from the employer on the date of application, and therefore not at work in the bargaining unit on the filing date – For all of these reasons, the application was dismissed

DRYDEN ELECTRIX INC.; RE JOSEPH RYAN OLIVERSON; RE IBEW AND THE IBEW CONSTRUCTION COUNCIL OF ONTARIO..(May/June) 537

Practice and Procedure – Alteration of Jurisdiction – Construction Industry – Judicial Review – Natural Justice – The Local alleged that the Board's decision, finding just cause for the International to assume jurisdiction of the Local over a computer centre construction project in Barrie, should be quashed on a number of grounds – The Board, noting that s. 147(5) operated to stay the assumption of the Local's jurisdiction, was concerned that a full hearing might render the result inconsequential and moot, sine the project was near completion held a two day consultation in accordance with Rule 41, as the situation required a speedy resolution – The Board, having acknowledged that there were facts in dispute, determined there was sufficient uncontested material to permit it to reach an appropriate decision – The Board fashioned a specific remedy placing restrictions and conditions on the International's transfer of jurisdiction – On judicial review, the court first found that Rule 41 was not *ultra vires*, since there was no improper delegation of authority by the Chair, nor was the rule inconsistent with the scheme of the Act – The court found that the rule sets a standard that must be met before a Vice Chair may exercise their discretion in the circumstances of a particular case, and that the Rule is entirely consistent while noting that the Board "operates in a complex, dynamic, and highly fluid environment where expeditious rulings and informal and accessible procedures are often essential to maintaining the delicate balance between the parties' various interests" – Second, the court found that the Board did not deny the Local natural justice by proceeding with a consultation rather than a full hearing, since the core value embraced by the *audi alteram partem* maxim was met by the Board: providing the parties with an opportunity to be heard – The court also found it was not patently unreasonable for the Board to have chosen this procedure, since the Board was given the authority to balance the need for complete natural justice on the one hand against expedition on the other – Third, the court found that the Board did not exceed its jurisdiction by making findings of fact in the absence of any evidence, since there was evidence before it, the sufficiency and weight of which were within its exclusive jurisdiction, permitting it to make its decision – Fourth, the court found that the Board did not deny natural justice by failing to provide adequate reasons, since it provided a sufficiently adequate explanation of the process it engaged in, the conclusions it reached, on what it founded those conclusions and the results of its conclusions – Finally the court found that the Board's decision on the merits was not patently unreasonable: it was a sound and sensible decision in circumstances of acrimony that permitted the appropriate labour relations objective to be achieved, with the least intrusion on the rights of the Local's members – Application dismissed

IBEW, LOCAL 1739; RE GUILD ELECTRIC LIMITED; RE OLRB ....(May/June) 669

Prima Facie Case – Related Employer – Sale of Business – The union sought a Board order consolidating its bargaining units of editorial employees as a result of the corporate restructuring and centralization initiatives undertaken by Sun Media's three newspapers – The responding parties asked the Board to dismiss the application under rule 39 – The Board found the staffing of non-union jobs in the Centres of Excellence with former bargaining unit employees did not constitute the sale of a business or part thereof – The Board then decided, assuming the responding parties were related employers, that there was no possibility it would grant the extraordinary remedy of bargaining unit consolidation for the following reasons: first, the consolidation would create a bargaining unit covering three municipalities, which runs contrary to the Board's usual practice; second, the union acknowledged the sharing of editorial content in the past and yet it has been content to organize on a newspaper by newspaper basis; third, the union can challenge the restructuring through grievances, an unfair labour practice complaint or in collective bargaining – Sale of business dismissed; declarations made

SUN MEDIA CORPORATION; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA LOCAL 87-M SOUTHERN ONTARIO NEWSMEDIA GUILD...(May/June) 649

Prima facie motion – Certification – Construction Industry – Membership Evidence – Practice and Procedure – Representation Vote – Unfair Labour Practice – The Company alleged that when employees signed membership cards they were confused and/or misled and did not realize what they were signing nor what the membership cards would be used for – First, the Board found that the allegations, even if true, do not breach s. 5 (the section cannot be violated); s. 15 (no particulars of employer domination); s. 70 (a union is not a "person" and was not acting as an "employer", hence it cannot violate the provision); or s. 76 (there was no "intimidation or coercion") – Accordingly, the Board dismissed the s. 96 complaint – Second, the Board found that these circumstances could give rise to the exercise of the Board's discretion to order a vote under s. 128.1(13)(b), even where the Union has more than 55% membership evidence, and accordingly, it dismissed the union's *prima facie* motion on this issue – Finally the Board refused to order disclosure of employee statements since the statements were covered by litigation privilege (collection of information by Company's counsel concerning what employees were doing on the date of application), and the balancing of competing interests also led to that conclusion – That is, since the information recorded in the statements would be given little, if any, weight (they were collected three to five weeks after the date of application), the potential undermining of the adversarial litigation process (by ordering the disclosure) outweighed any potential value that these statements had – Unfair Labour Practice complaint dismissed – Certification application continues

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486......................(Nov./Dec.) 1079

Prima Facie Motion – Construction Industry – Related Employer – The Carpenters were certified to represent carpenters employed by Titan; LIUNA, voluntarily recognized by Paramount, represented construction employees performing concrete formwork – The Carpenters sought a declaration that Paramount and Titan were related – LIUNA brought a motion to dismiss the application for failing to make out a *prima facie* case – The Board held that there was nothing to prevent LIUNA from acquiring bargaining rights with Paramount, notwithstanding that the Carpenters could have earlier claimed similar bargaining rights through a s. 1(4) application – *Prima facie* motion dismissed – Matter continues

TITAN CONTRACTING; RE GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS AND ALLIED TRADES UNITED BROTHERHOOD OF CARPENTERS, LOCAL 494; RE PARAMOUNT HOMES INC.; RE PORTOFINO CORPORATION; RE LIUNA, LOCAL 625 ....(Nov./Dec.) 1140

Project Agreement – Sector Determination – Standing – The Board found that the Greenfield Energy Centre project agreement came into force by operation of the *Labour Relations Act, 1995* when no valid objections to the proponent were filed with the Board – The Canadian Union of Skilled Workers filed a sector determination, challenging the project agreement and arguing it falls within the electrical power systems sector, as opposed to the ICI sector – The Board found that the CUSW has no standing to utilize the sector determination provisions of the Act to challenge the project agreement because it is not a bargaining agent bound to a provincial collective agreement – Furthermore, CUSW has no direct interest in the work of the project at present, and any future connection is purely speculative – Application for sector determination dismissed

GREENFIELD ENERGY CENTRE LP AND BURNS AND ROE ENTERPRISES, INC.; RE ONTARIO PIPE TRADES COUNCIL AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 663 .... (Mar./Apr.) 365

Public Sector Labour Relations Transition Act – Construction Industry – Judicial Review – Related Employer – Sale of Business – The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – The GECDSB sought judicial review of the Board's ruling – A majority of the Court confirmed the Board's finding that while the *PSLRTA* specifically precludes the application of s. 69 of the *Labour Relations Act, 1995* to events covered by that legislation, nothing in the *PSLRTA* prevented the Board from exercising its discretion under s. 1(4) to the same events – Application for judicial review dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD .... (Jan./Feb.) 255

Public Sector Labour Relations Transition Act – Construction Industry – Judicial Review – Related Employer – Sale of Business – Leave to appeal to Court of Appeal dismissed – Leave to appeal to Supreme Court of Canada dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD .... (Nov./Dec.) 1197

Public Sector Labour Relations Transition Act, 1997 – Bargaining Unit – Five community care access centres (CCACs) were merged – OPSEU applied to the Board for a determination of the appropriate bargaining agent and bargaining unit(s) – The applicant represents 190 of the affected employees in the single largest predecessor bargaining unit – The applicant asserts that a single "all employee" bargaining unit is appropriate, whereas the employer, CUPE and ONA assert that there should be two bargaining units: one comprised of professional employees and the other of office and clerical employees – The Board noted that both options are consistent with the purpose of s.22(7) of the Act – Finding that either a single unit or a two-unit configuration could comfortably obtain for the newly-configured CCAC, the Board signaled its preference to maintain the *status* *quo* where there are existing, fully functional collective bargaining relationships – In this case four of five CCACs, or approximately sixty-five per cent of employees, operated under a two bargaining unit system – Two bargaining units ordered (*Editors' note:* Following the counting of the ballots, OPSEU won the office and clerical unit; ONA became the bargaining agent for the professional employees: decision dated May 12, 2007)

HAMILTON NIAGARA HALDIMAND BRANT COMMUNITY CARE ACCESS CENTRE; RE OPSEU; RE HAMILTON COMMUNITY CARE ACCESS CENTRE; RE BRANT COMMUNITY CARE ACCESS CENTRE; RE COMMUNITY CARE ACCESS CENTRE NIAGARA; RE COMMUNITY CARE ACCESS CENTRE OF HALTON; RE HALDIMAND-NORFOLK COMMUNITY CARE ACCESS CENTRE; RE CUPE AND ITS LOCAL 4700; RE ONTARIO NURSES ASSOCIATION...(May/June) 548

Public Service Labour Relations Transition Act - ONA sought a declaration that s. 9 of the PSLRTA applied to the Kensington Eye Institute, a not-for-profit corporation licensed by the Ministry of Health and Long Term Care as an independent health facility – The Board found that the Institute was opened in January 2006 and the amendments to s. 9 of the Act that would be applicable to its operation were not enacted until March – Notwithstanding that the Institute was clearly part of the government's health restructuring strategy, the health services integration was an event that occurred prior to the amendments, therefore the Board found that the Act did not apply – Application dismissed

THE KENSINGTON EYE INSTITUTE; RE ONTARIO NURSES' ASSOCIATION; UNIVERSITY HEALTH NETWORK, MOUNT SINAI HOSPITAL; SUNNYBROOK HEALTH SCIENCES CENTRE, C.U.P.E. LOCAL 5001 AND SEIU LOCAL 1...(Nov./Dec.) 1117

Reconsideration – Jurisdictional Dispute – The Operating Engineers sought reconsideration of a Board decision confirming the assignment of the demolition of a highway overpass to the Labourers – The IUOE argued that members of a different Labourers local (than the one named in the JD) performed the work in dispute, and consequently the Operating Engineers were unfairly prejudiced in the Board's examination of employer and area practice – The Board held that it traditionally looks at the tradespeople performing the craft, not at representation rights – Similarly, the Board does not assess the skills and experience of individual workers assigned to a project, but looks to the propriety of the work assignment to the particular craft – Finally, the Board held that it was appropriate to consider the same project from both the employer practice and the area practice perspectives; these are different questions, and often the answers to them are not the same – Reconsideration denied

PRIESTLY DEMOLITION INC.; RE LIUNA, LOCAL 837; RE IUOE, LOCAL 793; RE ONTARIO ASSOCIATION OF DEMOLITION CONTRACTORS INC.. (Mar./Apr.) 419

Reconsideration – Certification – Membership Evidence – Practice and Procedure – In the context of a reconsideration of a certification application where the trade union provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis – As the request for reconsideration was proceeding to hearing, the union sought the Board's permission to disclose to the employer the identity of the person whose signature was challenged – Disclosure granted – Matter continues

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..(Jan./Feb.) 125

Reconsideration – Certification – Construction Industry – Employee – Membership Evidence – Practice and Procedure – In a request for reconsideration of a successful certification application where the employer had provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis – The handwriting expert determined that it was highly probable that the person who signed the affidavit had also earlier signed the membership evidence – The responding party submitted that the employee in question admitted that the signature on the membership card was his – Request for reconsideration withdrawn

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..(Mar./Apr.) 396

Reconsideration – Certification – Construction Industry – Evidence – Judicial Review – Natural Justice – Practice and Procedure – The Carpenters moved to set aside the decision of a single judge of Divisional Court permitting the employer to rely on an affidavit in support of its judicial review application of the Board's certification decision (see [2006] OLRB Rep. September/October 756) – A full panel of the Divisional Court held that the motions judge was not "clearly wrong" in concluding that one paragraph of the affidavit ought to be received by the reviewing panel in support of the employer's allegation that it was denied natural justice by the Board – The balance of the affidavit, however, should be struck because it contains material not before the Board and it is clear the Board's decision was rendered on the basis of evidence before it – The "new evidence" foundation for judicial review cannot succeed – Motion allowed in part

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND ONTARIO LABOUR RELATIONS BOARD..(Jan./Feb.) 249

Reconsideration – Certification – Construction Industry – Trade Union Status – The Carpenters sought reconsideration of a Board decision granting the Sheet Metal Workers trade union status (unreported Board decision, June 20, 2007) in eight certification applications – The Carpenters argued that the Board denied them procedural fairness by not allowing them to adduce evidence relating to an earlier finding of status involving different employees and employers – The Board held that it acted properly in refusing the Carpenters the opportunity to lead evidence on the earlier files: first, the Board assumed all of the material facts and particulars pled concerning the earlier applications to be true; secondly, the parties in those matters were not before the Board; and finally, the Sheet Metal Workers had agreed not to rely on those earlier cases, but to establish its trade union status *de novo* – The Board further held that if the Carpenters wished to pursue their allegations of impropriety relating to the earlier files, there were processes available to them for doing so under the Act; the Board specifically did not rule on what effect or consequences any findings of fault in those unfair labour practices might have on the eight certification applications – Matter continues

EASTERN EAVESTROUGHING LTD.; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51; RE CARPENTERS & ALLIED WORKERS LOCAL 27, CJA..(Jul./Aug.) 758

Reconsideration – Certification – Construction Industry – Unfair Labour Practice – The Board was asked to reconsider its dismissal of a certification application; the dismissal was based on the Board's finding that a particular individual was performing bargaining unit work on the application date and was therefore included in the unit, reducing the applicant's requisite support for card-based certification; in a vote, conducted earlier on agreement of the parties, the union had lost – At the reconsideration hearing, the applicant adduced credible evidence that the impugned employee's time card had been altered to show he performed bargaining unit work and not office work, and the applicant only learned of the tampering after the dismissal of the application for certification – The Board found the employer violated s. 70 of the Act – Reconsideration granted, dismissal revoked, certificate issued

KOOL FAB MECHANICAL INC.; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION....................(Jul./Aug.) 774

Reconsideration – Duty of Fair Representation – Judicial Review – The Board exercised its discretion not to inquire into a duty of fair representation complaint when it ascertained the complaint was virtually identical to an earlier application that the applicant had withdrawn – The Board subsequently dismissed the applicant's request for reconsideration – On judicial review, the Court found the Board had acted reasonably and within its jurisdiction – Application for judicial review dismissed

SCADUTO; RE UFCW....................(Sept./Oct.) 981

Reconsideration – Employment Standards – Timeliness – The employer sought reconsideration of a Board order requiring it to pay the employee $10,000 in unpaid wages – Prior to the original hearing, the employer advised the Board that it was insolvent but it did not attend the hearing or present proof of insolvency – On reconsideration, the employer argued that it did not attend the hearing because of "off the record" advice it had received from the LRO – The Board found that even if the LRO had provided unofficial and erroneous advice, the employer had received the Board's Information Bulletin No. 24 and a Notice of Hearing with information regarding hearing attendance (and the consequences of non-attendance) – The Board also found that any representations by the LRO would have been ambiguous or unqualified to engage legitimate expectations – In addition, the Board held that the Request for Reconsideration was untimely as it was filed more than 70 days after the release of the decision – Ignorance of the Board's procedure is not a compelling reason for delay – Request for reconsideration dismissed

JOE BONE'S GRILL INC.; RE GIUSEPPE F. TEDESCO AND DIRECTOR OF EMPLOYMENT STANDARDS....................(Nov./Dec.) 1065

Reconsideration – Judicial Review – Lock-out – Natural Justice – Practice and Procedure – Strike – The TTC brought an application for a declaration that its employees were about to engage in an illegal strike at the start-up of the morning shift – The Board provided notice to the union and counsel who normally acted for the union of a 5:30 a.m. hearing by conference call to deal with the application, leaving telephone messages and sending a facsimile to the union's office – The Board held that the union had been served with the application and had received notice of the hearing – The Board ordered the employees to cease and desist from any further engagement in the unlawful strike – The ATU alleged the TTC had illegally locked out its employees, and also sought reconsideration of the earlier cease and desist order (the Whitaker decision) – The Board held that no lock-out was taking place, and stated that the parties could have had their differences considered through the grievance and arbitration process – The Board also found that the illegal strike was continuing – The Board stated that even if it were to find that the union had not received notice of the earlier hearing, it was not appropriate to vary the Board's order – The union had full opportunity to make the submissions it would have been able to make earlier – Lock-out application dismissed; reconsideration of strike application denied – On the judicial review, the union took the position that the Board exceeded its jurisdiction by conducting an "expedited hearing", without authority and that natural justice was breached by proceeding without the union in the first hearing and by unfairly limiting the union's presentation time in the second hearing – The court noted that context is often the balancing ingredient when weighing the undeniable tension as among the tribunal's ability to control its process, the duty of fairness and the degree of deference courts should afford the exercise of the tribunal's discretion – The court found that the Board was not proceeding pursuant to its authority under section 110(18) and Rule 41, but rather pursuant to the abridgement provisions in its general Rules – In derogating from the norm through abridgement, the Board may only vary times, not eliminate them; it must give notice of a hearing, although it may vary the manner of doing so; it must conduct a hearing, although it may allow it to proceed electronically; it must allow the parties full opportunity to present evidence and make submissions, although it may direct how this is to be done, including orally or in writing, whether by evidence admissible in court of law or not – The court reviewed the factors to be applied in assessing the Board's duty of procedural fairness as set out in *Baker*, concluding that the Board merits a high degree of deference with respect to the fairness of its procedural decisions – The court found that the circumstances, in this case, were extreme and warranted quick intervention and that the Board's abridgement of times and procedures, and its finding of proper service and notice were appropriate in the context of the situation and did not operate as a breach of fairness – The court found nothing wrong with limiting the time for presentations in the second hearing and that the union had sufficient and fair opportunity to present its evidence and make its position clear – Finally, the court found that if there was a deficiency of fairness in the initial hearing, it was cured by the reconsideration hearing – Application for judicial review dismissed

AMALGAMATED TRANSIT UNION, LOCAL 113; RE TORONTO TRANSIT COMMISSION AND OLRB.. (Sept./Oct.) 982

Reconsideration – Jurisdictional Dispute – Construction Industry – Interim Relief – Remedies – Strike – In the context of a jurisdictional dispute the Board issued an interim order, on reconsideration, assigning the disputed work to the Carpenters, after determining that the Labourers had engaged in strike activity designed solely to influence the assignment of work – The Board noted that the purpose of an interim order in a s. 99 context is to maintain the "status quo" pending the resolution of the application – The Board found that the "status quo" for the disputed work was that it had been performed exclusively by members of the Carpenters – The Board also noted, without deciding, that the Labourers claim to bargaining rights, and therefore a right to strike, at the project in question was problematic – The Board found that the Labourers had not negotiated or concluded any new collective agreements with the struck employers at the project – The only benefit that the Labourers had obtained as a result of the strike was an agreement from the constructor and two contractors to assign the disputed work only to subcontractors who employed members of Labourers – The Board therefore concluded that the sole purpose of the strike was to exert economic pressure on the constructor to assign the disputed work to the Labourers – The Board has consistently found that to engage in a strike in order to secure a work assignment is either unlawful or improper such that it will grant interim relief, whether or not the strike is otherwise lawful – The structure of the Act properly recognizes that pressing the issue of the assignment of particular work to impasse is undesirable, given its effect on the potential rights of parties outside the bargaining process – Such action tends to promote a similar strike response from the third-party union (as occurred in this case), rather than the resolution of the dispute under s. 99 without a work stoppage – The Board's interim order directing that the work be assigned to the Carpenters was not made effective until two weeks after the order, or when it would have been made but for the illegal response strike of the Carpenters – Matter continues

SNC-LAVALIN POWER ONTARIO 1409096 ONTARIO LIMITED C.O.B. AS PERI SCAFFOLDING AND ALUMA SYSTEMS CANADA INC.; RE CARPENTERS DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE LIUNA, LOCAL 506..(Jul./Aug.) 800

Reference – Conciliation – The Minister of Labour asked the Board to consider whether he had the authority to appoint a conciliation officer pursuant to section 18 of the Act – With respect to the parties' relationship in one specific Board area, the parties agreed that notice to bargain had been given and there was no subsisting collective agreement between them, so the Board confirmed that the Minister had the authority to appoint a conciliation officer for the parties' dispute in that Board area – With regard to the EPSCA bargaining unit, there was agreement between the parties that the Minister had the authority to appoint a conciliation officer, but they did not agree on the existence of a current collective agreement – The Labourers argued that they had given notice to bargain on more than one occasion after the IESO was established following the 1999 dissolution of Ontario Hydro – The Board held that the communication between the parties in 2003 did not constitute "bargaining" that would have prevented automatic renewal of the existing collective agreement – A letter from a mediator confirming his acceptance of an appointment to mediate cannot be construed as a written notice from one party to the other of its desire to terminate, revise or modify a collective agreement – Similarly, the filing of an application with the Board seeking recognition of bargaining rights and a declaration regarding the applicant's rights does not amount to written notice to the other party of a desire to bargain a renewal agreement – The Board found that the only valid notice to bargain was issued in September 2006, and it would only operate to prevent the renewal of the collective agreement set to expire on April 30, 2008 – The Board rejected the Labourers' contention that the agreement ceased to operate as a matter of law because the responding party refused to recognize the union's bargaining rights – Minister has authority to appoint conciliation officer

INDEPENDENT ELECTRICITY SYSTEM OPERATOR; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA, LOCAL 1059............... (Mar./Apr.) 370

Reference – *Ambulance Services Collective Bargaining Act, 2001* – The City of Cornwall sought a Board-ordered Essential Services Agreement (ESA) for its ambulance drivers – Shortly thereafter, the Minister of Labour asked the Board whether he had the authority to issue a "no board" report – The Union opposed the City's application to the Board on the basis that (a) the parties had agreed to settle all future collective agreements by interest arbitration if necessary; and (b) the parties had already agreed to an ESA for the current round of bargaining – The Board found that there had been no agreement to "perpetual" interest arbitration due to; (1) the lack of "clearest possible language" indicating such in the memorandum of agreement; (2) the failure of the parties' bargaining history to demonstrate the offer and acceptance of the alleged terms; (3) and the conduct of the parties that belied the existence of such an agreement – The Board found that the ESA was not agreed to by the employer as the union did not present the final ESA to the City for approval after incorporating the terms requested by the City – The City's application was allowed to proceed – The Minister was advised that he had the authority to issue a "no board" report

THE CORPORATION OF THE CITY OF CORNWALL; RE CUPE LOCAL 3251 PARA ....(Jan./Feb.) 198

Reference – Bargaining Rights – Collective Agreement – Sale of Business – Voluntary Recognition – Bingo Press was sold to Arrow which was located in Niagara Falls – The union's collective agreement with Bingo Press was limited in geographic scope to St. Catherines – The employer asked the Board to dismiss the union's sale of business application for failing to plead a *prima facie* case – The Board's determination of the motion would decide the Ministerial reference (whether the minister had the authority to appoint a conciliation officer) and accordingly the reference was joined with the sale of business application – The union took the position that its bargaining rights arose from an oral voluntary recognition agreement or from estoppel – The Board found that the bargaining rights and collective agreement transferred to Arrow and the only issue was whether the collective agreement applied to Arrow's operation in Niagara Falls – The Board found that only collective agreements transfer on the sale of business, not oral amendments to scope clauses or oral voluntary recognition agreements – The Board found that the estoppel argument failed for two reasons: first there was no clear promise or representation made by Bingo Press and second, there was no detrimental reliance – Accordingly the union's sale of business application was dismissed for failing to prove a *prima facie* case and the Board's advice to the Minister was that he did not have the authority to appoint a conciliation officer – Application dismissed and advice given

BINGO PRESS & SPECIALTY LIMITED/ARROW GAMES (BAZAAR & NOVELTY); RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS' UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 462...(Mar./Apr.) 307

Reference – Constitutional Law – Interim Relief – Intervenor – Judicial Review – Unfair Labour Practice – On a ministerial reference regarding the appointment of a conciliator, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – On judicial review, the Divisional Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the appellant had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the Court held that the Board had the statutory authority to conduct the proceedings as it did – The application for judicial review was dismissed – On appeal, the Court of Appeal noted that – (1) there was still no evidence of an aboriginal practice, custom or tradition that supports the right to enact a distinct Code – (2) such a practice would not be integral to the distinctive culture of the appellant – (3) there was no reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim – The decisions of the Board and Divisional Court were correct – Considering the Crown's duty to consult and accommodate the aboriginal claim, the

Court found that meaningful consultation could not have taken place because the appellant had not made known its claim during the unionization drive and certification proceedings – The Court also found that the appellant, rather than the Crown, had taken peremptory and unilateral action which initiated the dispute – The Crown did not breach its duty to consult and accommodate – Appeal dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB ....(Nov./Dec.) 1197

Reference – Construction Industry – The Minister of Labour asked the Board if he could accede to a joint request from the Employee and Employer Bargaining Agencies of the plumbers and pipefitters industry (ICI sector) to alter the designated bargaining unit description to include gasfitters and their apprentices – The Board found that the fact that gasfitter was not a distinct craft but rather a task performed by at least two skilled trades was a compelling reason against the requested amendment – The Board distinguished between work jurisdictional claims and descriptions of crafts; describing crafts in a general way promotes the flexibility of the industry to adapt to technological changes – Inserting work tasks may increase uncertainty and litigation in certification applications – The Board advised the Minister that the requested amendment would not serve the interests of the labour relations community and was not necessary to advance or protect the craft of plumber and pipefitter

MECHANICAL CONTRACTORS ASSOCIATION OF ONTARIO; RE IUOE LOCAL 793; RE ONTARIO SHEET METAL WORKERS AND ROOFERS CONFERENCE, SHEET METAL WORKERS INTERNATIONAL UNION LOCAL 285; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP ....(Jan./Feb.) 126

Reference – *Hospital Labour Disputes Arbitration Act* – This Ministerial reference requested the Board's advice on whether employees of Montfort Renaissance Inc. ("MRI") were covered by the Act – The Board used the following criteria to determine whether MRI met the statutory definition of a "hospital" as set out in the HLDAA: (i) the entity must serve persons who suffer from physical or mental illness, ongoing disease or be convalescent or chronically ill; (ii) the entity must be a hospital or "other institution"; and (iii) the entity must be operated for the observation, care or treatment of such persons – Firstly, the Board held that there could be no doubt that persons whom MRI served in all three of its programs (mental health and housing, health stop, and Detox Centre) were persons who suffered from physical or mental illness – Secondly, having regard to the purpose of the HLDAA, which is to ensure uninterrupted delivery of services to those vulnerable persons whose health and safety could be jeopardized if those services were unavailable because of a strike or lockout, the Board found that MRI's Detox Centre met the definition of "hospital" in the HLDAA – In response to MRI's assertion that the Addiction Workers working in the Detox Centre did not provide services that could be characterized as medical in nature and did not have any medical training, the Board held that the observation, care or treatment contemplated under HLDAA need not be medical in nature to fall within the statutory definition – Thirdly, the Board was satisfied that the Detox Centre was operated for the observation, care and treatment of residents in the detoxification process – Finally, regarding the question of whether MRI, when considered as a whole (all three programs), was properly characterized as an "other institution", the Board held that it was, since the statutory scheme contemplated the possibility of over-inclusion – In the result, the Board's advice to the Minister was that MRI was a "hospital" within the meaning of the HLDAA

MONTFORT RENAISSANCE INC. (SERVICE DE SANTÉ DES SOEURS DE LA CHARITÉ D'OTTAWA); RE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4540 .... (Sept./Oct.) 909

Related Employer – Certification – Construction Industry – Employer – Practice and Procedure – Timeliness – The Board found nothing wrong with the application naming three possible employers as responding parties: the applicant specifically referenced subsection 1(4) and asked that the certificate name all three entities – The responding party filed its response five days late but asked the Board to exercise its discretion to accept the late-filed information in accordance with the ruling of the Divisional Court in *Maystar* (see [2007] OLRB Rep. March/April 459) – The Board examined possible criteria for the exercise of discretion: the nature of certification applications and the need for speed in their determination; the reasons for the late filing; prejudice to the applicant – The Board finds that prejudice is present in every case, and will be the same in every case – In the circumstances of this case, the Board does not exercise its discretion to accept the late-filed information – The applicant delivered its materials to three fax machines for the three employers; personal delivery is not a requirement of the Act or the Board's Rules – Time extension allowed for response to related employer allegations – Matter continues

REIDS UPTOWN HOMES, REIDCO NORTH LTD., S.R. PROPERTIES INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL .... (May/June) 633

Related Employer – Certification – Practice and Procedure – Remedies – Unfair Labour Practice – The Labourers filed an application to represent the employees of Postma, seeking remedial certification as well as a declaration that Postma and Specific are a single employer – As a further remedy for Postma's alleged unfair labour practice (one of Postma's owners had advocated a preference for CLAC over the Labourers in the days prior to the representation vote), the Labourers asked the Board to terminate CLAC's bargaining rights with Specific – The Board held that the revocation of a union's bargaining rights is an extreme remedy, to be invoked only in the most serious cases of wrongdoing – In the instant case, the Labourers were asking the Board to revoke CLAC's bargaining rights in the absence of any suggestion of wrongdoing by CLAC; CLAC was the innocent beneficiary of wrongdoing committed by Postma – The Board made a preliminary determination that it would not order the termination of CLAC's bargaining rights with Specific – Matter continues

1614818 ONTARIO INC c.o.b. POSTMA CONCRETE FORMING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 53 AFFILIATED WITH CHRISTIAN LABOUR ASSOCIATION OF CANADA .... (Mar./Apr.) 297

Related Employer – Construction Industry – *Prima Facie* Motion – The Carpenters were certified to represent carpenters employed by Titan; LIUNA, voluntarily recognized by Paramount, represented construction employees performing concrete formwork – The Carpenters sought a declaration that Paramount and Titan were related – LIUNA brought a motion to dismiss the application for failing to make out a *prima facie* case – The Board held that there was nothing to prevent LIUNA from acquiring bargaining rights with Paramount, notwithstanding that the Carpenters could have earlier claimed similar bargaining rights through a s. 1(4) application – *Prima facie* motion dismissed – Matter continues

TITAN CONTRACTING; RE GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS AND ALLIED TRADES UNITED BROTHERHOOD OF CARPENTERS, LOCAL 494; RE PARAMOUNT HOMES INC.; RE PORTOFINO CORPORATION; RE LIUNA, LOCAL 625 ....(Nov./Dec.) 1140

Related Employer – Construction Industry – Judicial Review – Parties – Sale of Business – Settlement – The Council brought a motion to quash the judicial review, characterizing it as prematurely seeking a review of an interim decision of the Board – In the 69/1(4) application the responding party employers brought a motion to the Board to dismiss the application because of Minutes of Settlement purporting to bind the Council and any of its affiliates from bringing such applications for ten years – The Board found that although the individual who signed the agreement on behalf of Local 586 was also the President of the Council there was no evidence that he had actual or ostensible authority to bind the Council – The Board dismissed the employers' motion and the sale of business/related employer applications continued before the Board, although the hearing on the merits had not yet commenced – The employers filed for judicial review –The court found this to be an exceptional or extraordinary situation that should properly be reviewed prior to the Board dealing with the merits – The court also assisted the parties in providing affidavit evidence to reflect the evidence that was before the Board

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO..(Jan./Feb.) 285

Related Employer – Construction Industry – Judicial Review – *Public Sector Labour Relations Transition Act* – Sale of Business – The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – The GECDSB sought judicial review of the Board's ruling – A majority of the Court confirmed the Board's finding that while the *PSLRTA* specifically precludes the application of s. 69 of the *Labour Relations Act, 1995* to events covered by that legislation, nothing in the *PSLRTA* prevented the Board from exercising its discretion under s. 1(4) to the same events – Application for judicial review dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD..(Jan./Feb.) 255

Related Employer – Construction Industry – Judicial Review – *Public Sector Labour Relations Transition Act* – Sale of Business – Leave to appeal to Court of Appeal dismissed – Leave to appeal to Supreme Court of Canada dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND

ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD .... (Nov./Dec.) 1197

Related Employer – Contempt – Consent to Prosecute – Order for Productions – Practice and Procedure – Sale of a Business – In the context of a s. 69/1(4) application, the Board issued a Confidentiality Order pertaining to documents produced by the responding parties – The responding parties subsequently alleged that the union breached the Confidentiality Order – The union argued the Board had no jurisdiction to consider such a breach – Dealing only with jurisdiction, the Board found that the issue of the breach and enforcement of Orders is one of mixed fact and law and, as such, falls within its jurisdiction – The Board noted that a part of its practice and procedure includes the power to compel the production of documents and to grant Orders protecting the confidentiality of such documents – The Board further noted that if it could not make determinations regarding a possible breach of a Confidentiality Order, such orders would be rendered meaningless – The Board rejected the union's contention that the responding parties had not provided sufficient particulars of their allegations, and that the Board's consideration of the issue would result in undue delay and a waste of the Board's time – The Board found that the fact that it may state a case to the Divisional Court for contempt or may grant a consent to prosecute merely confirms the Board's jurisdiction to consider the issue – Matter continues

KIMBERLY-CLARK CORPORATION AND KIMBERLY-CLARK INC.; NEENAH PAPER, INC. AND NEENAH PAPER COMPANY OF CANADA; BUCHANAN FOREST PRODUCTS LTD., TERRACE BAY PULP INC. AND EAGLE LOGGING INC.; RE UNITED STEELWORKERS LOCAL 1-2693 .... (Jul./Aug.) 765

Related Employer – Employment Standards – Judicial Review – Termination – Three companies appealed the ESO's order that they owed termination and severance pay to nearly 100 employees as a result of a finding that they were related businesses to "C," a bankrupt company, and should be treated as one employer pursuant to s. 4 of the Act – The Board found that s. 4 requires a finding that both subsections (a) and (b) be answered positively, and that there must be a causal connection between the "relatedness" of the companies and the insolvency before there is a declaration of one employer under the section – The Board allowed the application – The employees applied for judicial review – The court held that the applicable standard of review was reasonableness, as per s. 119(14) of the Act – The court affirmed the Board's interpretation of the test under s. 4 that there must be some connection between the relationship [between the companies] and the insolvency - The Board fully considered whether there was any *intent* to defeat the purposes of the Act when it considered how the owner came to acquire company "C" and that its status as a company separate from the others was at the insistence of the financing bank, not the principals – The Board also clearly considered the *effect* of the corporate structure in determining whether the purposes of the ESA had been defeated, and properly concluded that, rather than contributing to the insolvency, the other companies had "propped up" company "C" - There was sufficient evidence for the Board to conclude that the owner had not made a bankruptcy proposal "designed for rejection" – The Board did not err in considering cases decided under the former s. 12, as the issue of intent to defeat the ESA is still relevant under the current provision – The Board properly considered the conduct of the creditors in bringing about the bankruptcy in considering whether there was any impropriety connected with the insolvency, and whether the principals made reasonable efforts to avoid it – It was reasonable for the Board to conclude that the resources invested in a 'phoenix' company were not sufficient to keep

company "C" operating – The Board's decision was reasonable on the facts before it – Application for judicial review dismissed

ABDURAHMAN ABDOULRAB ET AL; RE NOVAQUEST FINISHING INC., CATELECTRIC INC., 4064186 CANADA INC. AND THE ONTARIO LABOUR RELATIONS BOARD ....(Jul./Aug.) 842

Related Employer – *Prima Facie* Case – Sale of Business – The union sought a Board order consolidating its bargaining units of editorial employees as a result of the corporate restructuring and centralization initiatives undertaken by Sun Media's three newspapers – The responding parties asked the Board to dismiss the application under rule 39 – The Board found the staffing of non-union jobs in the Centres of Excellence with former bargaining unit employees did not constitute the sale of a business or part thereof – The Board then decided, assuming the responding parties were related employers, that there was no possibility it would grant the extraordinary remedy of bargaining unit consolidation for the following reasons: first, the consolidation would create a bargaining unit covering three municipalities, which runs contrary to the Board's usual practice; second, the union acknowledged the sharing of editorial content in the past and yet it has been content to organize on a newspaper by newspaper basis; third, the union can challenge the restructuring through grievances, an unfair labour practice complaint or in collective bargaining – Sale of business dismissed; declarations made

SUN MEDIA CORPORATION; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA LOCAL 87-M SOUTHERN ONTARIO NEWSMEDIA GUILD........(May/June) 649

Related Employer – Sale of a Business – CUPE alleged that the City of Ottawa and the other responding parties were a single employer or, alternatively, that there had been a sale of business under the Act because a significant portion of the summer season bargaining unit work was being conducted by the companies on contract with the city – The union was unable, however, to identify any bargaining unit members who had lost work opportunities, been laid off or terminated because of the contracting arrangements – The employer brought a motion to have the application dismissed, or deferred to arbitration, arguing that there had been no disposition of any functional economic vehicle or part thereof by the city, that the city's existing relationships with both CUPE and the contractors permitted contracting out, and that any operational control over the work performed by the contractors was to be expected given the city's mandate to provide municipal services – Motion granted, application dismissed

CITY OF OTTAWA; RE CUPE, LOCAL 503; RE B & G GORHAM CONSTRUCTION INC.; RE ROB BURNS OPERATING AS BURNS LANDSCAPE MAINTENANCE, CONCORDIA PAVING LTD.; RE THOMAS CAVANAGH CONSTRUCTION LTD.; RE EXEL CONTRACTING INC.; JAKE'S LAWN CARE; RE KERN'S PROPERTY MAINTENANCE; RE LANDTECH INC.; RE LAURENT LEBLANC LTD.; RE M.A. THOMPSON CARTAGE LTD.; RE MALCOLM MORRIS OPERATING AS MAC MORRIS CARTAGE & EQUIPMENT RENTALS AND MAC & MIKE MORRIS EQUIPMENT RENTALS, MOUNTAINVIEW TURF FARM LTD.; RE YANNICK BRULE OPERATING AS NEED A CUT SERVICES, PROP-COM MANAGEMENT INC.; RE QUINN & COMPANY AND KANATA WEST LANDSCAPE MAINTENANCE........(May/June) 516

Remedies – Certification – Certification where Act Contravened – Construction Industry – Representation Vote – Unfair Labour Practice – The union brought an application for certification and remedial certification under s. 11, alleging that the employer had contravened the Act by terminating a union organizer, thereby preventing the union from being able to demonstrate it had more than 40% membership support – The employer, solely owned by Normoyle, had four employees during the relevant time period – McCarthy, the inside union organizer, was terminated nine days after being hired, and the day after Normoyle discovered there was a union organizing drive – The Board did not accept that McCarthy was fired for performance deficiencies, for being slow in his work and for being late – The Board noted that the employer did not warn or reprimand McCarthy for these matters at the time they occurred, nor was he allowed any opportunity to change – The Board found the totality of the performance issues were of no consequence to Normoyle at the time they occurred because he did not act on them – The Board further found that the timing of the termination, one day after Normoyle discovered that McCarthy was involved in the union organizing the work place, was significant in light of the lack of employer-demonstrated reasons for termination – The Board found that McCarthy was fired because he was behind the union organizing drive and this was a breach of the Act – The Board then turned to the appropriate remedy under s. 11 recognizing that it can only certify without a representation vote where "no other remedy would be sufficient to counter the effects of the contravention" – The Board found that the employees could not freely express their wishes in a representation vote in the context of a discharge of an individual associated with union activity – The employer's actions served two purposes: stopping the union organizer from accessing employees and sending a message to employees that support for the union meant job loss – The Board found that a representation vote with ancillary relief would be insufficient to counter this effect – The union's application under s. 11 was granted and the union was certified – Application granted

1443760 ONTARIO INC. OPERATING AS SWING STAGE EQUIPMENT RENTALS OTTAWA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93...(May/June) 485

Remedies – Certification – Construction Industry – Representation Vote – Unfair Labour Practice – The union filed an application for card-based certification as well as an unfair labour practice complaint alleging violations of ss. 70, 72 and 76 of the Act – Because the Board had earlier determined that 40 to 55 percent of the employees in the bargaining unit were members of the union on the date that the application for certification was filed, the Board directed that a representation vote be held and counted forthwith (The union had asked the vote to be deferred until after the ULP was determined) – The Board held that if the union does not obtain 50 percent of the votes cast in the representation vote, s. 11(2) of the Act is still applicable and the unfair labour practice complaint will be heard – Matter continues

DOUBLE H CONCRETE FORMING; RE LIUNA, LOCAL 1059 ....(Nov./Dec.) 1030

Remedies – Certification – Construction Industry – Unfair Labour Practice – In this request for remedial certification the Board found: First, that the second-in-command asking employees if they had signed cards was intimidatory – Second, that the owner's statements without consequences, actual or intended, do not become unlawful statements simply because an employee overhears them in circumstances where it was not reasonable to expect that employee to overhear them – However, the owner's attempt to conduct surveillance on a meeting being held after hours (and off employer or customer property) for the purposes of discovering who might be interested in the union was improper and was a violation of s. 70 – Third, that a lay-off due to a temporary downturn in work was not tainted by any anti-union animus – This conclusion was supported by the fact that the employee did not actively demonstrate support for the union, and he was not involved in trying to recruit others; further, the employer offered him his job back two weeks later – Fourth, that the lay-off of the union's key inside organizer was in fact a discharge in violation of s. 72 – The Board held that while the employer did contravene the Act, these violations and the termination of the inside organizer, were not so serious that the Board could conclude that section 11 was the only appropriate remedy – Therefore, the Board ordered compensation to the inside organizer and a posting – ULP Application allowed, in part; Certification dismissed

L & L PAINTING AND DECORATING LTD.; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL UNION 557 .... (Sept./Oct.) 887

Remedies – Certification – Practice and Procedure – Related Employer – Unfair Labour Practice – The Labourers filed an application to represent the employees of Postma, seeking remedial certification as well as a declaration that Postma and Specific are a single employer – As a further remedy for Postma's alleged unfair labour practice (one of Postma's owners had advocated a preference for CLAC over the Labourers in the days prior to the representation vote), the Labourers asked the Board to terminate CLAC's bargaining rights with Specific – The Board held that the revocation of a union's bargaining rights is an extreme remedy, to be invoked only in the most serious cases of wrongdoing – In the instant case, the Labourers were asking the Board to revoke CLAC's bargaining rights in the absence of any suggestion of wrongdoing by CLAC; CLAC was the innocent beneficiary of wrongdoing committed by Postma – The Board made a preliminary determination that it would not order the termination of CLAC's bargaining rights with Specific – Matter continues

1614818 ONTARIO INC c.o.b. POSTMA CONCRETE FORMING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 53 AFFILIATED WITH CHRISTIAN LABOUR ASSOCIATION OF CANADA .... (Mar./Apr.) 297

Remedies – Certification – Representation Vote – Unfair Labour Practice – The union filed membership evidence on behalf of fewer than 40% of the bargaining unit, seeking remedial certification under s. 11 based on its accompanying unfair labour application – The employer's s. 8.1 notice was conceded to be relevant – The union requested that a vote be held, and the Board found that since a representation vote was one of the possible outcomes under s. 11, it would be preferable to hold the vote as close to the application date as possible – Also there was no need to seal the ballot box since it would not affect the outcome of the notice under s. 8.1 and the results of the vote would be a relevant consideration for the Board in granting relief under section 11 – Representation Vote ordered; matter continues

792844 ONTARIO INC. O/A SECORD CONSTRUCTION LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL .... (Jul./Aug.) 701

Remedies – Construction Industry – Jurisdictional Dispute – *Trades Qualification and Apprenticeship Act* – The Ironworkers (IW) applied for a declaration and other relief under s. 99 of the Act in relation to hoisting and rigging of piping equipment weighing in excess of two tons carried out by members of the Plumbers and Pipefitters (UA) – The Board found that the majority of the area practice in respect of the work in dispute, when done by contractors bound by agreements with both unions, was assigned to either members of the IW exclusively or to a composite of UA and IW members – The Board further held that the two trade agreements to which the UA and IW were bound in the area remained in force, as they were not inconsistent with area practice – The Board found there was no material difference in terms of economy or efficiency to have UA rather than IW members perform the small amount of work involved, given that both UA and IW members were employed on the project – The Board rejected the UA's argument that s. 3 of O. Reg. 572/99 under the *Occupational Health and Safety Act* limited the performance of the hoisting and rigging work in question to the plumber and steamfitter trades – In doing so, the Board noted that the work that a plumber or steamfitter does is found in s. 1 of their respective trade regulations under the *Trades Qualification and Apprenticeship Act*, and neither regulation limits hoisting and rigging work to one particular trade – The Board found that included in the scope of the work of an IW is the moving and placing of machinery and heavy equipment, which is required in order to perform the work described in para 1 of the IW Regulation – The Board noted, however, that the work of the trades under the TQAA is not synonymous with a union's work jurisdiction – On the basis of the trade agreements, the Board held that the work was properly assigned to members of the IW – Although no provision of the Act specifically allows for a prospective order regarding work assignment, the Board held that s. 99(5) was broad enough to encompass such a power – The Board declared that the hoisting and rigging work in question should be assigned to IW members, and directed the employer to assign that work to them in future

TESC CONTRACTING COMPANY LTD. AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 800; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 786....................................(Jul./Aug.) 817

Remedies – Construction Industry Grievance – Jurisdictional Dispute – Following a finding that Bondfield had incorrectly assigned drywall taping work to the Painters in the Kingston area, the Bricklayers sought damages for the breach – The Board canvassed its jurisprudence in JD-related damage claims, where it asks: was the action of the employer substantively unreasonable or was there procedural unreasonableness in the employer's decision-making process? – In this case, the Board found that the assignment by Bondfield clearly violated two important factors that would constitute indicia of unreasonableness (an earlier Board decision; and area practice) – Bondfield argued that its actions were not unreasonable and, in any event, it was not the employer proper since it had subcontracted the taping work to Oakdale, a party bound exclusively to the Painters agreement – The Board held that a work assignment which flies in the face of an unequivocal earlier Board ruling involving the same three parties amounts to second guessing the Board decision and will not be countenanced; a claim for work on the basis of a Board decision in a JD is superior to other claims based on other factors – Grievance allowed; quantum of damages remitted to the parties

BONDFIELD CONSTRUCTION; RE BRICK AND ALLIED CRAFT UNION OF CANADA, LOCAL 10 AND INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 10 ....(May/June) 499

Remedies – Employee – Interference with Trade Union – Unfair Labour Practice – The collective agreement between the University and YUSA included eligibility to participate in a pension plan and post-retirement benefits – The University, arguing retirees were not employees, refused to provide YUSA with the names and addresses of persons who had retired from the University and had been employed in the bargaining unit represented by YUSA immediately prior to their retirement – The Board did not find it necessary to determine whether retirees were "employees" for at least some purposes of the Act – The Board found as long as it was arguable that YUSA had an obligation or the right to pursue a grievance respecting the continued provision of benefits to retirees in accordance with the collective agreement provisions, the denial of information to it amounted to an interference with its administration, contrary to section 70 – Declaration and direction that information be provided

YORK UNIVERSITY; RE YORK UNIVERSITY STAFF ASSOCIATION....(May/June) 659

Remedies – Jurisdictional Dispute – Construction Industry – Interim Relief – Reconsideration – Strike – In the context of a jurisdictional dispute the Board issued an interim order, on reconsideration, assigning the disputed work to the Carpenters, after determining that the Labourers had engaged in strike activity designed solely to influence the assignment of work – The Board noted that the purpose of an interim order in a s. 99 context is to maintain the "status quo" pending the resolution of the application – The Board found that the "status quo" for the disputed work was that it had been performed exclusively by members of the Carpenters – The Board also noted, without deciding, that the Labourers claim to bargaining rights, and therefore a right to strike, at the project in question was problematic – The Board found that the Labourers had not negotiated or concluded any new collective agreements with the struck employers at the project – The only benefit that the Labourers had obtained as a result of the strike was an agreement from the constructor and two contractors to assign the disputed work only to subcontractors who employed members of Labourers – The Board therefore concluded that the sole purpose of the strike was to exert economic pressure on the constructor to assign the disputed work to the Labourers – The Board has consistently found that to engage in a strike in order to secure a work assignment is either unlawful or improper such that it will grant interim relief, whether or not the strike is otherwise lawful – The structure of the Act properly recognizes that pressing the issue of the assignment of particular work to impasse is undesirable, given its effect on the potential rights of parties outside the bargaining process – Such action tends to promote a similar strike response from the third-party union (as occurred in this case), rather than the resolution of the dispute under s. 99 without a work stoppage – The Board's interim order directing that the work be assigned to the Carpenters was not made effective until two weeks after the order, or when it would have been made but for the illegal response strike of the Carpenters – Matter continues

SNC-LAVALIN POWER ONTARIO 1409096 ONTARIO LIMITED C.O.B. AS PERI SCAFFOLDING AND ALUMA SYSTEMS CANADA INC.; RE CARPENTERS DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE LIUNA, LOCAL 506 ....(Jul./Aug.) 800

Representation Vote – Abandonment – Termination – Timeliness – The employer applied for termination of bargaining rights pursuant to s. 65 of the Act – The union provided the employer with notice to bargain on April 4, 2006 and promised to forward the union's available bargaining dates by the end of that month, then it transferred the file to another representative – The new union representative commenced an extended sick leave – In April of 2007, the union realized that no bargaining had occurred and sent out a notice of meeting for May 2007 – The Board found that the threshold for abandonment was not reached because the union attempted to begin bargaining once the delay was realized –

However, the Board also found that the union's delay in bargaining was significant and its explanation was unsatisfactory – The Board exercised its discretion to direct a representation vote – Matter continues

TICKETMASTER CANADA LTD.; RE CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION LOCAL 343 .... (Nov./Dec.) 1135

Representation Vote – Bargaining Unit – Build-Up – Certification – The union applied to certify a bargaining unit of employees employed at the employer's City of Vaughan site – The employer argued that the appropriate bargaining unit description should include both the City of Vaughan and the City of Brampton since it was about to transfer its remaining employees from the Brampton location to the new Vaughan facility – According to the employer, excluding the remaining Brampton employees would prevent them from having a say in whether they wished to be represented – In the alternative, the employer argued that the Board should hold a second representation vote under the build-up doctrine – The Board found that the consequences of not allowing the Brampton employees to have a say in the representation vote did not justify a departure from the Board's normal practice in limiting the geographic scope of a bargaining unit to one municipality – The Board also found that the size of the build-up only represented 16 percent of the total number of employees who were employed at both locations on the date of the application rather than the 50 percent found to be appropriate in earlier jurisprudence – Therefore, the number of employees employed in the bargaining unit on the date of the application was sufficiently representative of the employees in the ultimate bargaining unit – The bargaining unit applied for was appropriate – Certification granted

CAPITAL TOOL & DESIGN LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) .... (Nov./Dec.) 1015

Representation Vote – Certification – Certification where Act Contravened – Construction Industry – Remedies – Unfair Labour Practice – The union brought an application for certification and remedial certification under s. 11, alleging that the employer had contravened the Act by terminating a union organizer, thereby preventing the union from being able to demonstrate it had more than 40% membership support – The employer, solely owned by Normoyle, had four employees during the relevant time period – McCarthy, the inside union organizer, was terminated nine days after being hired, and the day after Normoyle discovered there was a union organizing drive – The Board did not accept that McCarthy was fired for performance deficiencies, for being slow in his work and for being late – The Board noted that the employer did not warn or reprimand McCarthy for these matters at the time they occurred, nor was he allowed any opportunity to change – The Board found the totality of the performance issues were of no consequence to Normoyle at the time they occurred because he did not act on them – The Board further found that the timing of the termination, one day after Normoyle discovered that McCarthy was involved in the union organizing the work place, was significant in light of the lack of employer-demonstrated reasons for termination – The Board found that McCarthy was fired because he was behind the union organizing drive and this was a breach of the Act – The Board then turned to the appropriate remedy under s. 11 recognizing that it can only certify without a representation vote where "no other remedy would be sufficient to counter the effects of the contravention" – The Board found that the employees could not freely express their wishes in a representation vote in the context of a discharge of an individual associated with union activity – The employer's actions served two purposes: stopping the union organizer from accessing employees and sending a message to employees that support for the union meant job loss – The Board found that a representation vote with ancillary relief would be insufficient to counter this effect – The union's application under s. 11 was granted and the union was certified – Application granted

1443760 ONTARIO INC. OPERATING AS SWING STAGE EQUIPMENT RENTALS OTTAWA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93..(May/June) 485

Representation Vote – Certification – Construction Industry – Membership Evidence – *Prima facie* motion – Practice and Procedure – Unfair Labour Practice – The Company alleged that when employees signed membership cards they were confused and/or misled and did not realize what they were signing nor what the membership cards would be used for – First, the Board found that the allegations, even if true, do not breach s. 5 (the section cannot be violated); s. 15 (no particulars of employer domination); s. 70 (a union is not a "person" and was not acting as an "employer", hence it cannot violate the provision); or s. 76 (there was no "intimidation or coercion") – Accordingly, the Board dismissed the s. 96 complaint – Second, the Board found that these circumstances could give rise to the exercise of the Board's discretion to order a vote under s. 128.1(13)(b), even where the Union has more than 55% membership evidence, and accordingly, it dismissed the union's *prima facie* motion on this issue – Finally the Board refused to order disclosure of employee statements since the statements were covered by litigation privilege (collection of information by Company's counsel concerning what employees were doing on the date of application), and the balancing of competing interests also led to that conclusion – That is, since the information recorded in the statements would be given little, if any, weight (they were collected three to five weeks after the date of application), the potential undermining of the adversarial litigation process (by ordering the disclosure) outweighed any potential value that these statements had – Unfair Labour Practice complaint dismissed – Certification application continues

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486......................(Nov./Dec.) 1079

Representation Vote – Certification – Construction Industry – Practice and Procedure – Unfair Labour Practice – LIUNA filed membership evidence in excess of 55% in support of this card-based application for certification – The responding party alleged that the union had acted improperly in its collection of membership evidence by assuring the employees they were only signing cards to get a vote and by advising the employees that the employer was supportive of the union – Further, a number of employees wrote to the Board stating that they did not wish to belong to the union, and requesting a representation vote – The Board ruled that the fact an employee signed a membership card but later had a change of heart would be irrelevant to the exercise of its discretion in certifying the union – The Board was concerned, however, about the employer's allegations and considered its options: to certify the union, to order a vote, or to dismiss the application – The Board determined that it should set the matter down for hearing to hear evidence about the allegations attributed to the union's organizers - Matter listed for hearing

HILLSIDE SOD LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183...(Nov./Dec.) 1037

Representation Vote – Certification – Construction Industry – Unfair Labour Practice – Remedies – The union filed an application for card-based certification as well as an unfair labour practice complaint alleging violations of ss. 70, 72 and 76 of the Act – Because the Board had earlier determined that 40 to 55 percent of the employees in the bargaining unit were members of the union on the date that the application for certification was filed, the Board directed that a representation vote be held and counted forthwith (The union had asked the vote to be deferred until after the ULP was determined) – The Board held that if the union does not obtain 50 percent of the votes cast in the representation vote, s. 11(2) of the Act is still applicable and the unfair labour practice complaint will be heard – Matter continues

DOUBLE H CONCRETE FORMING; RE LIUNA, LOCAL 1059 ....(Nov./Dec.) 1030

Representation Vote – Certification – Practice and Procedure – An application for certification was filed on August 22, 2006 – On March 15, 2007, the trade union accepted the employer's s. 8.1 challenge and, on the same date, filed a second application for certification – The employer argued that the second application should be barred pursuant to s. 111(3)(c) of the Act, s. 7(10) of the Act, or s. 111(2)(k) of the Act – In the alternative, the employer argued that the union should be precluded from challenging the inclusion of certain employees that had been included in the first application for certification and which had been agreed to on March 15, 2007 – The Board addressed each of the employer's arguments: (1) there is no basis to depart from the Board's usual practice of postponing consideration of a subsequent application until a final decision has been issued on the original application; (2) s. 7(10) does not apply since the application was not withdrawn; rather, the union accepted the employer's s. 8.1 objection, requiring the Board to dismiss the application under s. 8.1(5)7; and (3) the Board will generally only impose a bar when there have been successive unsuccessful applications or where the wishes of the employees have not been decisively tested in a representation vote – There had been no decisive testing or successive applications and the Board declined to exercise its discretion to dismiss the second application for certification – Finally, the Board held that voter eligibility must be determined on the date of the application for certification – Neither party is bound to lists of eligible voters by virtue of positions previously taken in a different application – First application dismissed – Second application continues

WILLIAM DAY CONSTRUCTION LIMITED RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 ....(Nov./Dec.) 1183

Representation Vote – Certification – Remedies – Unfair Labour Practice – The union filed membership evidence on behalf of fewer than 40% of the bargaining unit, seeking remedial certification under s. 11 based on its accompanying unfair labour application – The employer's s. 8.1 notice was conceded to be relevant – The union requested that a vote be held, and the Board found that since a representation vote was one of the possible outcomes under s. 11, it would be preferable to hold the vote as close to the application date as possible – Also there was no need to seal the ballot box since it would not affect the outcome of the notice under s. 8.1 and the results of the vote would be a relevant consideration for the Board in granting relief under section 11 – Representation Vote ordered; matter continues

792844 ONTARIO INC. O/A SECORD CONSTRUCTION LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL...(Jul./Aug.) 701

Reprisal – Discharge – Health and Safety – The applicant complained that she had been discharged for raising health and safety concerns associated with some renovations undertaken by the employer – The Board found the employer had addressed the employee's concerns in several ways, including changing the employee's shift – The Board held that the applicant had simply decided to move on to a job she knew was available to her, and wished to take advantage of what had transpired in the workplace to seek a monetary benefit – Application dismissed

IVY VETERINARY SERVICES; RE KRISTINE NEVILLE; RE DR. CATHY EMMS ....(May/June) 563

Reprisal – Discharge – Health and Safety – The applicant challenged her dismissal as a bus driver for the disabled – She was discharged after four incidents within a twelve-month period (three accidents and an instance of driving while her licence was suspended) – The applicant argued that every time she found a problem with her bus, or requested a change of bus because of an apparent malfunction, she was exercising her rights under the *Occupational Health and Safety Act* – The Board held (1) these concerns were handled by the maintenance department of the employer, (2) management was never made aware of them, and (3) these concerns could not be construed as an exercise of health and safety rights within the meaning of the Act – The Board found that progressive discipline was levied against the applicant in accordance with management policy and the collective agreement, and that termination was the appropriate response to the culminating incident – Application dismissed

TRANSHELP OF THE REGIONAL MUNICIPALITY OF PEEL; RE KYM URRY; RE CUPE LOCAL 966..(Jan./Feb.) 215

Reprisal – Employment Standards – Health and Safety – Work Refusal – The employee alleged he was dismissed because he had raised concerns with his employer regarding overtime pay and the safety of a van used in the course of his employment, contrary to s. 74 of the ESA and s. 50 of the OHSA, respectively – The Board held that there was no requirement under s. 50 of the OHSA for the employee to first comply with the Act *and then* seek its enforcement; rather, it is sufficient that the worker acted in compliance with the Act *or* sought its enforcement *or* gave evidence in a proceeding in relation to the enforcement of the Act – The Board held that there was no evidentiary basis for concluding that the employee had raised the subject of the safety of the van with his employer – The evidence revealed that the employee and employer engaged in an argument regarding the effect a diesel leak in the van would have on the employee's license, and this led to his discharge – No issue of overtime was raised during the argument – Application for review of ESO's decision not to issue an order finding a breach of s. 74 of the ESA dismissed – Employer found not to be in breach of s. 50(1) of the OHSA – Matter referred to Field Services to resolve Board's exercise of discretion under s. 50(7) of the OHSA – Matter continues

TRI-GREEN CONSTRUCTION INC.; RE DARRYL HICKEY ....(Jul./Aug.) 831

Sale of a Business – Contempt – Consent to Prosecute – Order for Productions – Practice and Procedure – Related Employer – In the context of a s. 69/1(4) application, the Board issued a Confidentiality Order pertaining to documents produced by the responding parties – The responding parties subsequently alleged that the union breached the Confidentiality Order – The union argued the Board had no jurisdiction to consider such a breach – Dealing only with jurisdiction, the Board found that the issue of the breach and enforcement of Orders is one of mixed fact and law and, as such, falls within its jurisdiction – The Board noted that a part of its practice and procedure includes the power to compel the production of documents and to grant Orders protecting the confidentiality of such documents – The Board further noted that if it could not make determinations regarding a possible breach of a Confidentiality Order, such orders would be rendered meaningless – The Board rejected the union's contention that the responding parties had not provided sufficient particulars of their allegations, and that the Board's consideration of the issue would result in undue delay and a waste of the Board's time – The Board found that the fact that it may state a case to the Divisional Court for contempt or may grant a consent to prosecute merely confirms the Board's jurisdiction to consider the issue – Matter continues

KIMBERLY-CLARK CORPORATION AND KIMBERLY-CLARK INC.; NEENAH PAPER, INC. AND NEENAH PAPER COMPANY OF CANADA; BUCHANAN FOREST PRODUCTS LTD., TERRACE BAY PULP INC. AND EAGLE LOGGING INC.; RE UNITED STEELWORKERS LOCAL 1-2693....................................(Jul./Aug.) 765

Sale of a Business – Related Employer – CUPE alleged that the City of Ottawa and the other responding parties were a single employer or, alternatively, that there had been a sale of business under the Act because a significant portion of the summer season bargaining unit work was being conducted by the companies on contract with the city – The union was unable, however, to identify any bargaining unit members who had lost work opportunities, been laid off or terminated because of the contracting arrangements – The employer brought a motion to have the application dismissed, or deferred to arbitration, arguing that there had been no disposition of any functional economic vehicle or part thereof by the city, that the city's existing relationships with both CUPE and the contractors permitted contracting out, and that any operational control over the work performed by the contractors was to be expected given the city's mandate to provide municipal services – Motion granted, application dismissed

CITY OF OTTAWA; RE CUPE, LOCAL 503; RE B & G GORHAM CONSTRUCTION INC.; RE ROB BURNS OPERATING AS BURNS LANDSCAPE MAINTENANCE, CONCORDIA PAVING LTD.; RE THOMAS CAVANAGH CONSTRUCTION LTD.; RE EXEL CONTRACTING INC.; JAKE'S LAWN CARE; RE KERN'S PROPERTY MAINTENANCE; RE LANDTECH INC.; RE LAURENT LEBLANC LTD.; RE M.A. THOMPSON CARTAGE LTD.; RE MALCOLM MORRIS OPERATING AS MAC MORRIS CARTAGE & EQUIPMENT RENTALS AND MAC & MIKE MORRIS EQUIPMENT RENTALS, MOUNTAINVIEW TURF FARM LTD.; RE YANNICK BRULE OPERATING AS NEED A CUT SERVICES, PROP-COM MANAGEMENT INC.; RE QUINN & COMPANY AND KANATA WEST LANDSCAPE MAINTENANCE...(May/June) 516

Sale of Business – Construction Industry – Judicial Review – Parties – Related Employer – Settlement – The Council brought a motion to quash the judicial review, characterizing it as prematurely seeking a review of an interim decision of the Board – In the 69/1(4) application the responding party employers brought a motion to the Board to dismiss the application because of Minutes of Settlement purporting to bind the Council and any of its affiliates from bringing such applications for ten years – The Board found that although the individual who signed the agreement on behalf of Local 586 was also the President of the Council there was no evidence that he had actual or ostensible authority to bind the Council – The Board dismissed the employers' motion and the sale of business/related employer applications continued before the Board, although the hearing on the merits had not yet commenced – The employers filed for judicial review –The court found this to be an exceptional or extraordinary situation that should properly be reviewed prior to the Board dealing with the merits – The court also assisted the parties in providing affidavit evidence to reflect the evidence that was before the Board

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO...(Jan./Feb.) 285

Sale of Business – Construction Industry – Judicial Review – *Public Sector Labour Relations Transition Act* – Related Employer – The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – The GECDSB sought judicial review of the Board's ruling – A majority of the Court confirmed the Board's finding that while the *PSLRTA* specifically precludes the application of s. 69 of the *Labour Relations Act, 1995* to events covered by that legislation, nothing in the *PSLRTA* prevented the Board from exercising its discretion under s. 1(4) to the same events – Application for judicial review dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD...(Jan./Feb.) 255

Sale of Business – Bargaining Rights – Collective Agreement – Reference – Voluntary Recognition – Bingo Press was sold to Arrow which was located in Niagara Falls – The union's collective agreement with Bingo Press was limited in geographic scope to St. Catherines – The employer asked the Board to dismiss the union's sale of business application for failing to plead a *prima facie* case – The Board's determination of the motion would decide the Ministerial reference (whether the minister had the authority to appoint a conciliation officer) and accordingly the reference was joined with the sale of business application – The union took the position that its bargaining rights arose from an oral voluntary recognition agreement or from estoppel – The Board found that the bargaining rights and collective agreement transferred to Arrow and the only issue was whether the collective agreement applied to Arrow's operation in Niagara Falls – The Board found that only collective agreements transfer on the sale of business, not oral amendments to scope clauses or oral voluntary recognition agreements – The Board found that the estoppel argument failed for two reasons: first there was no clear promise or representation made by Bingo Press and second, there was no detrimental reliance – Accordingly the union's sale of business application was dismissed for failing to prove a *prima facie* case and the Board's advice to the Minister was that he did not have the authority to appoint a conciliation officer – Application dismissed and advice given

BINGO PRESS & SPECIALTY LIMITED/ARROW GAMES (BAZAAR & NOVELTY); RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS' UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 462...(Mar./Apr.) 307

Sale of Business – Construction Industry – Judicial Review – *Public Sector Labour Relations Transition Act* – Related Employer – Leave to appeal to Court of Appeal dismissed – Leave to appeal to Supreme Court of Canada dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD..(Nov./Dec.) 1197

Sale of Business – *Prima Facie* Case – Related Employer – The union sought a Board order consolidating its bargaining units of editorial employees as a result of the corporate restructuring and centralization initiatives undertaken by Sun Media's three newspapers – The responding parties asked the Board to dismiss the application under rule 39 – The Board found the staffing of non-union jobs in the Centres of Excellence with former bargaining unit employees did not constitute the sale of a business or part thereof – The Board then decided, assuming the responding parties were related employers, that there was no possibility it would grant the extraordinary remedy of bargaining unit consolidation for the following reasons: first, the consolidation would create a bargaining unit covering three municipalities, which runs contrary to the Board's usual practice; second, the union acknowledged the sharing of editorial content in the past and yet it has been content to organize on a newspaper by newspaper basis; third, the union can challenge the restructuring through grievances, an unfair labour practice complaint or in collective bargaining – Sale of business dismissed; declarations made

SUN MEDIA CORPORATION; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA LOCAL 87-M SOUTHERN ONTARIO NEWSMEDIA GUILD..(May/June) 649

Sector Determination – Bargaining Unit – Certification – Construction Industry – The parties to these various applications for certification sought a determination from the Board for a number of issues relating to bargaining units – In an earlier decision (May 24, 2006), the Board confirmed that the appropriate bargaining unit is the bargaining unit described in the EPSCA collective agreement which bound the parties at the time the applications were filed – The Board assisted the parties in clarifying the work covered in the bargaining unit description – The Board confirmed that the bargaining unit described in the August 22, 2005 decision was limited to the electrical power systems sector, and held that the certificates should make specific reference to that sector – Finally, the Board made determinations respecting the correct names of the responding parties – Separate certificates to issue at a later date

ONTARIO POWER GENERATION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE LIUNA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE POWER WORKERS UNION CANADIAN UNION OF PUBLIC EMPLOYEES, C.L.C. LOCAL 1000..............................(Jan./Feb.) 146

Sector Determination – Project Agreement – Standing – The Board found that the Greenfield Energy Centre project agreement came into force by operation of the *Labour Relations Act, 1995* when no valid objections to the proponent were filed with the Board – The Canadian Union of Skilled Workers filed a sector determination, challenging the project

agreement and arguing it falls within the electrical power systems sector, as opposed to the ICI sector – The Board found that the CUSW has no standing to utilize the sector determination provisions of the Act to challenge the project agreement because it is not a bargaining agent bound to a provincial collective agreement – Furthermore, CUSW has no direct interest in the work of the project at present, and any future connection is purely speculative – Application for sector determination dismissed

GREENFIELD ENERGY CENTRE LP AND BURNS AND ROE ENTERPRISES, INC.; RE ONTARIO PIPE TRADES COUNCIL AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 663 .... (Mar./Apr.) 365

Security Guards – Certification – Conflict of Interest – The employer objected to the certification of a bargaining unit of security guards at its client AA, asserting that a conflict of interest would arise because a local of the applicant holds bargaining rights for two other groups of AA's employees – Although the parties focused their submissions on the extent that the guards monitor AA's employees, the Board found that monitoring made up only a small part of the guards' duties – Even the guards' obligation to search individual employees' vehicles in specific circumstances did not give rise to the conflict of interest contemplated by paragraph 1 of s. 14(5) – Certificate granted

HAWTHORNE SECURITY & COMMUNICATIONS INC.; RE IAM.............(Jan./Feb.) 91

Settlement – Construction Industry – Judicial Review – Parties – Related Employer – Sale of Business – The Council brought a motion to quash the judicial review, characterizing it as prematurely seeking a review of an interim decision of the Board – In the 69/1(4) application the responding party employers brought a motion to the Board to dismiss the application because of Minutes of Settlement purporting to bind the Council and any of its affiliates from bringing such applications for ten years – The Board found that although the individual who signed the agreement on behalf of Local 586 was also the President of the Council there was no evidence that he had actual or ostensible authority to bind the Council – The Board dismissed the employers' motion and the sale of business/related employer applications continued before the Board, although the hearing on the merits had not yet commenced – The employers filed for judicial review –The court found this to be an exceptional or extraordinary situation that should properly be reviewed prior to the Board dealing with the merits – The court also assisted the parties in providing affidavit evidence to reflect the evidence that was before the Board

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO...(Jan./Feb.) 285

Settlement – Construction Industry Grievance – Following a Board ruling that found the employer related to another unionized company and, thereby, bound by the provincial ICI agreement, the union filed two grievances respecting the assignment of work to its members; the employer filed its own grievance, complaining that the union would not accept its existing employees into membership; all three grievances were dealt with by the Labour Management Relations Committee of the grievance procedure, with the union succeeding on all counts – The issues were referred to the Board with the union arguing the LMRC's decision was a settlement enforceable by a Board decision, and the employer stating the LMRC did not issue a decision but if it did, it could not and should

not be enforced – The Board held that the actions of the LMRC did constitute a decision, the issue to be determined being its enforceability – The Board examined the language of the iterations of the collective agreement dating back to 1992 (when an LMRC decision was in dispute) and found significance in the changes in wording referring to "parties to the collective agreement" as opposed to "parties to the grievance" – The greater precision in identifying whose rights are at stake in the LMRC decision caused the Board to reject the union's preliminary motion that the decision was enforceable as a settlement – Matter continues

INDUSTRIAL REDI-WORKS INC.; RE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO AND ITS LOCAL 1916...(Mar./Apr.) 381

Settlement – Construction Industry Grievance – The Carpenters acknowledged they received a certified cheque from the responding party as part of a settlement – They further acknowledged having signed a release – The Carpenters lost the cheque and requested a hearing to enforce the settlement agreement – The Board found the responding party had lived up to its obligations; that the applicant received the consideration contemplated by the release, and that the loss or destruction of the cheque while in the applicant's possession does not make the responding party liable to replace it – Grievance referral dismissed

J & A GENERAL CONTRACTORS INC.; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA...(Jan./Feb.) 115

Settlement – Employment Standards – Fraud – Twenty-three claimants had reached a settlement with one of three directors of SLMsoft Inc. – A term of the settlement released all three directors from any obligations, upon receipt of the entire payment by the director who signed the settlement – The payment was never made – The Board determined that the term of the settlement forfeiting the employees' entitlement to seek relief from directors only arose upon payment of the money – The Board also found that a director's purported letter of resignation was fraudulent and that it induced the claimants to enter into the settlement – Pursuant to s. 120(5) the claimants were entitled to an order voiding the settlement agreement on the basis of fraud – Matter re-listed for Hearing

SLM SOFT INC.; RE GOVIN MISIR, A DIRECTOR; RE EDDIE LAW, A DIRECTOR; DR. BUDHENDRANAUTH DOOBAY, A DIRECTOR; RE MURAT TAYFUN CAN ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS...(Mar./Apr.) 422

Settlement – Employment Standards – The employee (one of three co-defendants in a civil action by the employer alleging breach of contract, conspiracy and theft) signed an affidavit in support of a motion in the civil action referring to the fact that the employer had stopped payment on her last pay cheque – The employee's *ESA* complaint was known to the parties when the lawsuit was settled and all three defendants entered into a standard release "from any and all claims" with respect to the court file – The employer submitted that the employee was barred from filing the claim pursuant to s. 98 and because she had already received a benefit under the settlement – First the Board found that an interlocutory motion by a defendant in a civil action is not the commencement of a civil proceeding and accordingly does not bar her claim under s. 98 – Second, the release did not specifically reference the *ESA*, and it easily could have, given the parties' knowledge of the claim – Accordingly, the release was no impediment to the employee's claim – Application dismissed, order to pay confirmed

TOTAL DEBT FREEDOM INC.; RE REBECCA DAVIS AND DIRECTOR OF EMPLOYMENT STANDARDS..(Nov./Dec.) 1147

Standing – Accreditation – Construction Industry – Intervenor – In this application for accreditation for all employers of employees engaged in concrete forming construction, the parties to the Carpenters' ICI collective agreement, which also engage in concrete forming construction, sought status as intervenors – The Board found that the intervenors could not be legally affected by the accreditation proceeding since the accreditation order is limited to the employers with whom the responding party has a collective agreement relationship; and where an employer is bound by both the intervenors' ICI agreement and the applicants' and respondents' agreement an accreditation order would neither detract from the bargaining rights held by the intervenors, nor expand the bargaining rights of the responding party – The Board also found nothing special or unique about this accreditation proceeding that would warrant the Board's exercise of its discretion to grant intervention by parties without a legal interest in the matter – Standing denied – Applicants' motion granted

THE ONTARIO FORMWORK ASSOCIATION; RE THE FORMWORK COUNCIL OF ONTARIO; RE CARPENTERS EMPLOYER BARGAINING AGENCY; RE CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA..(Nov./Dec.) 1125

Standing – Fraud – Unfair Labour Practice – The Carpenters complained that the Sheet Metal Workers committed a fraud on the Board that led to the Board issuing certificates to the SMW in respect of units of employees engaged in roofing and siding (in *Proaction Aluminum* and *Tops Roofing*) – The SMW subsequently filed other applications for certification seeking to displace the Carpenters – While they initially sought to rely on the trade union status they were awarded in *Proaction* and *Tops*, the SMW led new evidence to establish its status, independent of the earlier applications – The Carpenters sought an order from the Board revoking the earlier certificates and barring the SMW from bringing fresh applications for a period of one year – While the Board expressed its concern for the alleged conduct of the SMW in *Proaction* and *Tops*, it found that the Carpenters had no standing to bring the instant complaint: the Carpenters had no collective agreement with either of these employers, and they could provide no evidence that they had been victims of the fraud and had suffered some loss – Application dismissed

MIKE ABAZA PROACTION ALUMINUM; RE CARPENTERS & ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51; RE EASTERN EAVESTROUGHING LTD.; RE JACKSON ROOFING GTA INC.; RE 413554 ONTARIO LTD. C.O.B. CHOUINARD BROS. ROOFING; RE BURNHAMTHORPE ROOFING; RE DONIA ALUMINUM & ROOFING LTD; RE COLOMBUS ALUMINUM AND ROOFING LTD; RE TRUDEL & SONS ROOFING LTD; RE E.P. SIDING INC.; RE EXPERT EAVESTROUGHING; RE CHOUINARD BROS. ALUMINUM LTD.; RE GIANCOLA ALUMINUM CONTRACTORS LTD.; RE GM EXTERIORS INC.; ASPEN ALUMINUM LTD.; RE GORESKI ROOFING AND LATHING LTD.; RE GTA ALUMINUM INC.; CRO ALUMINUM INC. .... (Sept./Oct.) 898

Standing – Project Agreement – Sector Determination – The Board found that the Greenfield Energy Centre project agreement came into force by operation of the *Labour Relations Act, 1995* when no valid objections to the proponent were filed with the Board – The Canadian Union of Skilled Workers filed a sector determination, challenging the project agreement and arguing it falls within the electrical power systems sector, as opposed to the ICI sector – The Board found that the CUSW has no standing to utilize the sector determination provisions of the Act to challenge the project agreement because it is not a bargaining agent bound to a provincial collective agreement – Furthermore, CUSW has no direct interest in the work of the project at present, and any future connection is purely speculative – Application for sector determination dismissed

GREENFIELD ENERGY CENTRE LP AND BURNS AND ROE ENTERPRISES, INC.; RE ONTARIO PIPE TRADES COUNCIL AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 663 .... (Mar./Apr.) 365

Status – Certification – Construction Industry – Trade Union – The Board provided reasons for granting the Canadian Construction Workers' Union trade union status in the construction industry – After the Board rejected (in other previous decisions) the requests from various trade unions to intervene in the certification application, only the Painters and Carpenters were left to challenge the CCWU – The CCWU had altered its bargaining unit description to include only construction labourers working in the residential sector in Board Area 8 – The evidence established that the work being performed by the employees was concrete chipping and clean-up – The objections raised by the Painters and Carpenters were dismissed because their dispute was of a jurisdictional nature, rather than a challenge to bargaining rights for their particular crafts – The Board found that the CCWU had taken all necessary steps to establish itself as a trade union, and that it provided adequate evidence to meet the threshold that would identify it as a trade union pertaining to the construction industry – Certificate granted

PBS GENERAL CONTRACTORS INC. ; RE CANADIAN CONSTRUCTION WORKERS' UNION.. (Mar./Apr.) 412

Status – Certification – Construction Industry – Employee – Practice and Procedure – The employer sought to remove two names from its list of employees at the Regional Certification meeting for one of two proffered reasons: either because they were performing work of a different craft or they were independent contractors – The Board refused to allow the employer to alter its list – The prejudice to the union in having to attempt to ascertain what work the employees were doing on an ordinary day two months earlier was significant and perhaps impossible to overcome – Secondly, the facts pleaded by the employer to establish independent contractor status were equivocal and therefore also prejudicial – Motion dismissed – Matter continues

MELANDI DRYWALL SYSTEM INC.; RE IUPAT, LOCAL 1891...............(Nov./Dec.) 1075

Status – Certification – Construction Industry – Practice and Procedure – Timeliness – The respondent employer sought to add an employee to the bargaining unit two weeks after the application for certification was first filed – The Board held that the Divisional Court's ruling in *Maystar* [2007] OLRB Rep. March/April 459 regarding the Board's discretion to consider late evidence filed by a responding party applies to these circumstances – The Board noted that the ability of a trade union to determine what tasks an employee performed on the date of application "diminishes by the hour," but that prejudice to the union as a result of late filing of information will not result in every case

– The Board held that the two-week delay in notifying the Board coupled with a failure to notify the union earlier would result in prejudice to the union if the employee was included on the list – The Board rejected the argument that the employer could act as a proxy for the employee holding that there was an adequate process for the employee to assert his right to participate – The Board also held that it is not for the employer to raise the rights and interests of an employee, particularly where the employee himself has not sought to assert that he is an employee in the bargaining unit – The Board denied the request of the respondent to add the employee to the list – Matter continues

STRUCT-CON CONSTRUCTION LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..........(Jul./Aug.) 810

Status – Certification – Employee – The Board examined the position of "inventory clerk" or "auditor" for purposes of certification of a clerical unit of the employer's employees – The parties had earlier agreed to alter the recognition clause of the employer's production unit because the auditors were supervisors within the meaning of the bargaining unit description – In the current application the union sought to have the auditors excluded either because they were supervisors or because they performed managerial functions within the meaning of s. 1(3) of the Act – The Board held that since the parties had agreed the auditors exercised supervisory functions so as to be excluded from the production unit, and there was no material change in their status prior to the instant application, they remained supervisors within the meaning of the clerical bargaining unit – Status determined

PENSKE LOGISTICS; RE TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 880..........(May/June) 617

Status – *Colleges Collective Bargaining Act* – Employee – OPSEU asked the Board to determine whether four continuing education instructors were employees under the CCBA and, if so, whether they fall within the academic bargaining unit – St. Lawrence brought a motion seeking to have the Board defer the issue to arbitration – The Board held that its powers under s. 81 of CCBA were similar to the jurisdiction it enjoyed regarding employee status disputes under s. 114(2) of the LRA – The parties agreed, and the Board accepted, that arbitrators had the authority to make the same determinations – The Board was not satisfied that there was any overriding public policy or remedial opportunity that made it more appropriate than arbitration for a determination of the issue – Application dismissed

ST. LAWRENCE COLLEGE; RE OPSEU..........(Sept./Oct.) 951

Statutory Holiday – Employment Standards – The employer sought a review of an order to comply with the holiday pay provisions of the *Employment Standards Act, 2000* – The employer argued that the loss of a substitute day off for public holidays which fall on a day that is not ordinarily a working day for the employee was compensated for in this case by greater rights or benefits in the employment contract – The Board agreed that the employer's plan for public holidays provided a greater right or benefit, as contemplated by s. 5(2), and therefore it did not need to determine whether the plan was consistent with the Act – The Board noted that the claimant received 10 public holidays as opposed to the 8 provided for under the Act – The Board noted in addition that, for a number of those holidays, the claimant received 12 hours of holiday pay, as opposed to the 8.4 hours he would be entitled to under the Act – It was uncontested that the employer's maintenance operation was a continuous operation, and therefore the employer could require employees to work on any public holiday that would ordinarily be a working day under s.

28 of the Act – The employer in this case, however, gave its maintenance employees the choice of whether or not to work on a public holiday that was ordinarily a working day – The Board held that when both the employee's monetary entitlement and time off were considered, the employer's plan provided a greater right or benefit, and the choice to work public holidays in particular offset any lost holiday time – Appeal allowed

BOWATER CANADIAN FOREST PRODUCTS INC.; RE WAYNE LEARNING AND DIRECTOR OF EMPLOYMENT STANDARDS ....(Jul./Aug.) 713

Stay – *Companies' Creditors Agreement Act* – Certification – Two days after the ballots were counted in this application and more than fifty percent were cast in favour of the union, the Ontario Superior Court of Justice issued an order staying all proceedings in respect of the responding party, Dovecorp – The applicant argued that the issuance of the certificate was merely an administrative function reflecting the results reached prior to the stay – The Board held that the breadth of the court order precluded the Board from taking any steps without leave of the court – Application adjourned *sine die*

DOVECORP ENTERPRISES INC.; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION ....(Jul./Aug.) 738

Strike – *Ambulance Services Collective Bargaining Act, 2001* – Essential Services Agreement – Interest Arbitration – Lock-Out – The union and the employer entered into an essential service agreement pursuant to the *ASCBA* where the number of employees who must work during a strike or lock-out were the exact same number that would be employed in the normal course – The employer's application asked the Board to find that "no meaningful lock-out can occur" in the circumstances and to direct binding arbitration to settle the collective agreement, while the union's application asked the Board to find that the employer had breached the essential services agreement – The Board found that for a lock-out (or strike) to be "meaningful" it must permit "the application of economic sanctions in order to further and support the collective bargaining process" – Since no employees would be locked out as a result of the essential service agreement, the Board concluded that the essential service agreement between the parties effectively precludes the employer from engaging in a lock-out – Employer's application allowed; final and binding interest arbitration directed; union's application dismissed

SUN PARLOUR EMERGENCY SERVICES INCORPORATED (ESSEX DIVISION); RE SEIU, LOCAL 1.ON .... (Mar./Apr.) 447

Strike – Judicial Review – Lock-out – Natural Justice – Practice and Procedure – Reconsideration – The TTC brought an application for a declaration that its employees were about to engage in an illegal strike at the start-up of the morning shift – The Board provided notice to the union and counsel who normally acted for the union of a 5:30 a.m. hearing by conference call to deal with the application, leaving telephone messages and sending a facsimile to the union's office – The Board held that the union had been served with the application and had received notice of the hearing – The Board ordered the employees to cease and desist from any further engagement in the unlawful strike – The ATU alleged the TTC had illegally locked out its employees, and also sought reconsideration of the earlier cease and desist order (the Whitaker decision) – The Board held that no lock-out was taking place, and stated that the parties could have had their differences considered through the grievance and arbitration process – The Board also found that the illegal strike was continuing – The Board stated that even if it were to find that the union had not received notice of the earlier hearing, it was not appropriate to vary the Board's order – The union had full opportunity to make the submissions it would

have been able to make earlier – Lock-out application dismissed; reconsideration of strike application denied – On the judicial review, the union took the position that the Board exceeded its jurisdiction by conducting an "expedited hearing", without authority and that natural justice was breached by proceeding without the union in the first hearing and by unfairly limiting the union's presentation time in the second hearing – The court noted that context is often the balancing ingredient when weighing the undeniable tension as among the tribunal's ability to control its process, the duty of fairness and the degree of deference courts should afford the exercise of the tribunal's discretion – The court found that the Board was not proceeding pursuant to its authority under section 110(18) and Rule 41, but rather pursuant to the abridgement provisions in its general Rules – In derogating from the norm through abridgement, the Board may only vary times, not eliminate them; it must give notice of a hearing, although it may vary the manner of doing so; it must conduct a hearing, although it may allow it to proceed electronically; it must allow the parties full opportunity to present evidence and make submissions, although it may direct how this is to be done, including orally or in writing, whether by evidence admissible in court of law or not – The court reviewed the factors to be applied in assessing the Board's duty of procedural fairness as set out in *Baker*, concluding that the Board merits a high degree of deference with respect to the fairness of its procedural decisions – The court found that the circumstances, in this case, were extreme and warranted quick intervention and that the Board's abridgement of times and procedures, and its finding of proper service and notice were appropriate in the context of the situation and did not operate as a breach of fairness – The court found nothing wrong with limiting the time for presentations in the second hearing and that the union had sufficient and fair opportunity to present its evidence and make its position clear – Finally, the court found that if there was a deficiency of fairness in the initial hearing, it was cured by the reconsideration hearing – Application for judicial review dismissed

AMALGAMATED TRANSIT UNION, LOCAL 113; RE TORONTO TRANSIT COMMISSION AND OLRB.. (Sept./Oct.) 982

Strike – Jurisdictional Dispute – Construction Industry – Interim Relief – Reconsideration – Remedies – In the context of a jurisdictional dispute the Board issued an interim order, on reconsideration, assigning the disputed work to the Carpenters, after determining that the Labourers had engaged in strike activity designed solely to influence the assignment of work – The Board noted that the purpose of an interim order in a s. 99 context is to maintain the "status quo" pending the resolution of the application – The Board found that the "status quo" for the disputed work was that it had been performed exclusively by members of the Carpenters – The Board also noted, without deciding, that the Labourers claim to bargaining rights, and therefore a right to strike, at the project in question was problematic – The Board found that the Labourers had not negotiated or concluded any new collective agreements with the struck employers at the project – The only benefit that the Labourers had obtained as a result of the strike was an agreement from the constructor and two contractors to assign the disputed work only to subcontractors who employed members of Labourers – The Board therefore concluded that the sole purpose of the strike was to exert economic pressure on the constructor to assign the disputed work to the Labourers – The Board has consistently found that to engage in a strike in order to secure a work assignment is either unlawful or improper such that it will grant interim relief, whether or not the strike is otherwise lawful – The structure of the Act properly recognizes that pressing the issue of the assignment of particular work to impasse is undesirable, given its effect on the potential rights of parties outside the bargaining process – Such action tends to promote a similar strike response from the third-party union (as occurred in this case), rather than the resolution of the dispute under s. 99 without a work stoppage – The Board's interim order directing that the work be assigned to the Carpenters was not made effective until two weeks after the order, or when it would have been made but for the illegal response strike of the Carpenters – Matter continues

SNC-LAVALIN POWER ONTARIO 1409096 ONTARIO LIMITED C.O.B. AS PERI SCAFFOLDING AND ALUMA SYSTEMS CANADA INC.; RE CARPENTERS DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE LIUNA, LOCAL 506 .... (Jul./Aug.) 800

Termination – Practice and Procedure – Timeliness – This application under s. 66 of the Act, was filed one year to the date of the signing of the voluntary recognition agreement – The responding party argued that it was out of time, and that the applicant was not at work in the bargaining unit on the date of application – The Board found that an application under s. 66 of the Act does not fall within the construction provisions of the Board's Rules, so Rule 3.4 applies, rather than Rule 24.2 – The applicant used the services of a private courier (not Priority Post), so the application date was the date the materials were received by the Board – The applicant was on leave from the employer on the date of application, and therefore not at work in the bargaining unit on the filing date – For all of these reasons, the application was dismissed

DRYDEN ELECTRIX INC.; RE JOSEPH RYAN OLIVERSON; RE IBEW AND THE IBEW CONSTRUCTION COUNCIL OF ONTARIO .... (May/June) 537

Termination – Abandonment – Representation Vote – Timeliness – The employer applied for termination of bargaining rights pursuant to s. 65 of the Act – The union provided the employer with notice to bargain on April 4, 2006 and promised to forward the union's available bargaining dates by the end of that month, then it transferred the file to another representative – The new union representative commenced an extended sick leave – In April of 2007, the union realized that no bargaining had occurred and sent out a notice of meeting for May 2007 – The Board found that the threshold for abandonment was not reached because the union attempted to begin bargaining once the delay was realized – However, the Board also found that the union's delay in bargaining was significant and its explanation was unsatisfactory – The Board exercised its discretion to direct a representation vote – Matter continues

TICKETMASTER CANADA LTD.; RE CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION LOCAL 343 .... (Nov./Dec.) 1135

Termination – Bargaining Rights – Construction Industry – Employer Initiation – The employer was certified in both the ICI and non-ICI sectors of the construction industry – The employer acknowledged that employees may have heard him express his disappointment with the union – Two applications for the termination of bargaining rights were filed by an employee – The first was filed 5 months after the union was certified; the second, exactly 6 months after the union was certified – The union alleged that both applications were influenced by the employer under section 63(16) of the Act – The Board noted, relying on *Tenaquip Ltd.* that circumstantial evidence may be sufficient to lead to an inference of improper employer involvement – The Board found that the employer influenced the first application for the termination of bargaining rights because the employer: 1) expressed his disappointment with the union to its employees; 2) informed the employees that a decertification application could be filed; 3) signed the petition filed with the first application; and 4) may have even been involved in circulating the petition – The Board also considered the fact that the employees were paid for the time they took to mail the application – The Board further found that the employer influenced the second application for the termination of bargaining rights because the employee could not explain: 1) how the application and the second petition were drafted; 2) how the application was sent to the union and to the Board; and 3) the reason the application was sent so close to the first and untimely application – Applications dismissed

SWING N SCAFF INC.; RE CARON, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93 ....(Nov./Dec.) 1106

Termination – Bargaining Rights – During the on-going litigation of this non-construction employer application, the Board was asked to consider whether certain construction work undertaken by the School Board as part of a contract for services funded by Human Resources Development Canada operated to exclude the School Board from the definition of a non-construction employer – The Board found that it was possible for an entity such as the School Board to be a construction employer, although its principal business is not in the construction industry – Further, the HRDC, a branch of the federal government to which the *Labour Relations Act, 1995* specifically does not apply, was an unrelated party for purposes of the present analysis – The Board held that (1) the School Board did perform some construction work as part of its contract with HRDC, but the contract was to provide educational services and the building work was merely incidental to the fulfillment of the terms of the contract; (2) the payment the School Board received from HRDC did not, in the Board's view, constitute compensation from an unrelated person for work in the construction industry; (3) consequently, the limited construction work did not preclude the School Board from continuing with its assertion that it was a non-construction employer – Matter continues

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 6; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE IUPAT, LOCAL 1494; RE LIUNA, LOCAL 625 ....(Sept./Oct.) 874

Termination – Bargaining Rights – Employer Initiation – Practice and Procedure – The employer argued that the trade union should be precluded from alleging a violation of s. 63(16) because it failed to particularize the impugned conduct in a timely way – The Board upheld the employer's position, stating that the union must engage in due diligence to articulate its position as promptly as possible, in accordance with the Board's Rules – This failure of due diligence (a delay of over three months) caused the Board to deny the union the opportunity to lead evidence relating to employer initiation – Matter continues

WALLS.COM INC.; RE DARREN CATES; RE THE CARPENTER'S DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTER'S AND JOINERS OF AMERICA AND ITS LOCAL 494 AND CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL AND GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL & ALLIED WORKERS AND UNITED BROTHERHOOD OF CARPENTER'S AND JOINTERS OF AMERICA; AND THE FOLLOWING LOCAL UNIONS; 18, 27, 93, 249, 397, 446, 494, 675, 785, 1256, 1669, 1946, 1988, 2041, 2222 AND 2486 ....(Nov./Dec.) 1179

Termination – Build-Up – Certification – Voluntary Recognition Agreement – In an application for certification filed by CUPW, the intervenor, LIUNA Local 183, claimed that the application was barred because it had a VRA with the responding employer – In reply, CUPW requested that the Board declare, pursuant to s. 66 of the Act, that Local 183 was not entitled to represent the employees of the bargaining unit at the time it entered into the VRA with the employer – CUPW further submitted that the Board should apply the principle of "build up" in making its determination under s. 66, as only 41% of the workforce was employed by Distinction at the time it entered into the VRA with Local 183 – The Board held that it could only consider whether Local 183 was entitled to represent the employees in the bargaining unit "at the time the agreement was entered into," and therefore build-up had no application under s. 66 – The Board further held that, in the absence of a finding of improper conduct, it generally does not set aside agreements reached by employers and their incumbent unions – Rather, "the Board preserves the labour relations regime and stability that has been established by the parties [as t]his is consistent with the stated purposes of the Act" – Matter continues

DISTINCTION SERVICE PLUS INC.; RE THE CANADIAN UNION OF POSTAL WORKERS; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183.....(Jul./Aug.) 730

Termination – Construction Industry – Practice and Procedure – Timeliness – The application was received by the Board on May 4, 2007, having been delivered to a courier on May 2, 2007 – The Board held that as a rule an application is filed on the day the Board actually receives it, the only exception occurring in the construction industry where certifications and terminations given to Priority Courier will be deemed to have been filed on the date they were given to the courier (Rule 24.2) – The applicant in the present case gave his application to a different courier – The Board was not prepared to extend the exception beyond the one contemplated in the Rules – Application dismissed

YORKWOOD HOMES; RE MARK JONES; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183..(May/June) 667

Termination – Employment Standards – Judicial Review – Related Employer – Three companies appealed the ESO's order that they owed termination and severance pay to nearly 100 employees as a result of a finding that they were related businesses to "C," a bankrupt company, and should be treated as one employer pursuant to s. 4 of the Act – The Board found that s. 4 requires a finding that both subsections (a) and (b) be answered positively, and that there must be a causal connection between the "relatedness" of the companies and the insolvency before there is a declaration of one employer under the section – The Board allowed the application – The employees applied for judicial review – The court held that the applicable standard of review was reasonableness, as per s. 119(14) of the Act – The court affirmed the Board's interpretation of the test under s. 4 that there must be some connection between the relationship [between the companies] and the insolvency - The Board fully considered whether there was any *intent* to defeat the purposes of the Act when it considered how the owner came to acquire company "C" and that its status as a company separate from the others was at the insistence of the financing bank, not the principals – The Board also clearly considered the *effect* of the corporate structure in determining whether the purposes of the ESA had been defeated, and properly concluded that, rather than contributing to the insolvency, the other companies had "propped up" company "C" - There was sufficient evidence for the Board to conclude that the owner had not made a bankruptcy proposal "designed for rejection" – The Board did not err in considering cases decided under the former s. 12, as the issue of intent to defeat the ESA is still relevant under the current provision – The Board properly considered the conduct of the creditors in bringing about the bankruptcy in considering

whether there was any impropriety connected with the insolvency, and whether the principals made reasonable efforts to avoid it – It was reasonable for the Board to conclude that the resources invested in a 'phoenix' company were not sufficient to keep company "C" operating – The Board's decision was reasonable on the facts before it – Application for judicial review dismissed

ABDURAHMAN ABDOULRAB ET AL; RE NOVAQUEST FINISHING INC., CATELECTRIC INC., 4064186 CANADA INC. AND THE ONTARIO LABOUR RELATIONS BOARD ....(Jul./Aug.) 842

Timeliness – Abandonment – Representation Vote – Termination – The employer applied for termination of bargaining rights pursuant to s. 65 of the Act – The union provided the employer with notice to bargain on April 4, 2006 and promised to forward the union's available bargaining dates by the end of that month, then it transferred the file to another representative – The new union representative commenced an extended sick leave – In April of 2007, the union realized that no bargaining had occurred and sent out a notice of meeting for May 2007 – The Board found that the threshold for abandonment was not reached because the union attempted to begin bargaining once the delay was realized – However, the Board also found that the union's delay in bargaining was significant and its explanation was unsatisfactory – The Board exercised its discretion to direct a representation vote – Matter continues

TICKETMASTER CANADA LTD.; RE CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION LOCAL 343..(Nov./Dec.) 1135

Timeliness – Certification – Construction Industry – Employer – Practice and Procedure – Related Employer – The Board found nothing wrong with the application naming three possible employers as responding parties: the applicant specifically referenced subsection 1(4) and asked that the certificate name all three entities – The responding party filed its response five days late but asked the Board to exercise its discretion to accept the late-filed information in accordance with the ruling of the Divisional Court in *Maystar* (see [2007] OLRB Rep. March/April 459) – The Board examined possible criteria for the exercise of discretion: the nature of certification applications and the need for speed in their determination; the reasons for the late filing; prejudice to the applicant – The Board finds that prejudice is present in every case, and will be the same in every case – In the circumstances of this case, the Board does not exercise its discretion to accept the late-filed information – The applicant delivered its materials to three fax machines for the three employers; personal delivery is not a requirement of the Act or the Board's Rules – Time extension allowed for response to related employer allegations – Matter continues

REIDS UPTOWN HOMES, REIDCO NORTH LTD., S.R. PROPERTIES INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL ....(May/June) 633

Timeliness – Certification – Construction Industry – Practice and Procedure – The Board finds that in a card-based application for certification, there is no prejudice to the union if the responding party fails to provide the response to the union at the same time it files it with the Board – The response was delivered to the applicant one week after it was due – The Board relieves against the late delivery of the response – Matter continues

LEMMO MASONRY INC.; RE LIUNA LOCAL 527 ....(May/June) 584

Timeliness – Certification – Construction Industry – Practice and Procedure – Status – The respondent employer sought to add an employee to the bargaining unit two weeks after the application for certification was first filed – The Board held that the Divisional Court's ruling in *Maystar* [2007] OLRB Rep. March/April 459 regarding the Board's discretion to consider late evidence filed by a responding party applies to these circumstances – The Board noted that the ability of a trade union to determine what tasks an employee performed on the date of application "diminishes by the hour," but that prejudice to the union as a result of late filing of information will not result in every case – The Board held that the two-week delay in notifying the Board coupled with a failure to notify the union earlier would result in prejudice to the union if the employee was included on the list – The Board rejected the argument that the employer could act as a proxy for the employee holding that there was an adequate process for the employee to assert his right to participate – The Board also held that it is not for the employer to raise the rights and interests of an employee, particularly where the employee himself has not sought to assert that he is an employee in the bargaining unit – The Board denied the request of the respondent to add the employee to the list – Matter continues

STRUCT-CON CONSTRUCTION LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..(Jul./Aug.) 810

Timeliness – Construction Industry – Practice and Procedure – Termination – The application was received by the Board on May 4, 2007, having been delivered to a courier on May 2, 2007 – The Board held that as a rule an application is filed on the day the Board actually receives it, the only exception occurring in the construction industry where certifications and terminations given to Priority Courier will be deemed to have been filed on the date they were given to the courier (Rule 24.2) – The applicant in the present case gave his application to a different courier – The Board was not prepared to extend the exception beyond the one contemplated in the Rules – Application dismissed

YORKWOOD HOMES; RE MARK JONES; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183..(May/June) 667

Timeliness – Employment Standards – Reconsideration – The employer sought reconsideration of a Board order requiring it to pay the employee $10,000 in unpaid wages – Prior to the original hearing, the employer advised the Board that it was insolvent but it did not attend the hearing or present proof of insolvency – On reconsideration, the employer argued that it did not attend the hearing because of "off the record" advice it had received from the LRO – The Board found that even if the LRO had provided unofficial and erroneous advice, the employer had received the Board's Information Bulletin No. 24 and a Notice of Hearing with information regarding hearing attendance (and the consequences of non-attendance) – The Board also found that any representations by the LRO would have been ambiguous or unqualified to engage legitimate expectations – In addition, the Board held that the Request for Reconsideration was untimely as it was filed more than 70 days after the release of the decision – Ignorance of the Board's procedure is not a compelling reason for delay – Request for reconsideration dismissed

JOE BONE'S GRILL INC.; RE GIUSEPPE F. TEDESCO AND DIRECTOR OF EMPLOYMENT STANDARDS..(Nov./Dec.) 1065

Timeliness – Practice and Procedure – Termination – This application under s. 66 of the Act, was filed one year to the date of the signing of the voluntary recognition agreement – The responding party argued that it was out of time, and that the applicant was not at work in the bargaining unit on the date of application – The Board found that an

application under s. 66 of the Act does not fall within the construction provisions of the Board's Rules, so Rule 3.4 applies, rather than Rule 24.2 – The applicant used the services of a private courier (not Priority Post), so the application date was the date the materials were received by the Board – The applicant was on leave from the employer on the date of application, and therefore not at work in the bargaining unit on the filing date – For all of these reasons, the application was dismissed

DRYDEN ELECTRIX INC.; RE JOSEPH RYAN OLIVERSON; RE IBEW AND THE IBEW CONSTRUCTION COUNCIL OF ONTARIO..(May/June) 537

Trade Union – Alteration of Jurisdiction – Construction Industry – Trusteeship – After a local union withdrew from various programs of its parent union and took steps to affiliate itself with a rival union, the parent revoked the local's charter – The local claimed that the revocation violated sections 147 and 149 of the *Act* – The Board held that section 149 had no application as the parent did not attempt to retain any of the legal or institutional attributes of the local – A parent union is entitled to sever its relationship with a local, subject only to the just cause requirement of section 147 – The Board is not likely to weigh the merits of the parent's decision as long as it severs the relationship completely and does not do so for a coercive or punitive motive – The revocation of the charter would harm viable and stable collective bargaining and cause serious labour relations problems because (i) no collective agreement would apply to the geographical area under the local's jurisdiction and (ii) it would unravel a previous order made by the Board that prevented the irreconcilable differences between the parties from disrupting the entire construction industry and inflicting significant damage to the economic interests of both employers and members of the union – The parent would not be able to demonstrate just cause for the revocation of the charter unless it simultaneously took steps to transfer the rights, privileges and duties of the local to the employee bargaining agency – The Board found that the parent acted without just cause and declared the attempted revocation to be null and void

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 25..(Jan./Feb.) 101

Trade Union – Certification – Construction Industry – Status – The Board provided reasons for granting the Canadian Construction Workers' Union trade union status in the construction industry – After the Board rejected (in other previous decisions) the requests from various trade unions to intervene in the certification application, only the Painters and Carpenters were left to challenge the CCWU – The CCWU had altered its bargaining unit description to include only construction labourers working in the residential sector in Board Area 8 – The evidence established that the work being performed by the employees was concrete chipping and clean-up – The objections raised by the Painters and Carpenters were dismissed because their dispute was of a jurisdictional nature, rather than a challenge to bargaining rights for their particular crafts – The Board found that the CCWU had taken all necessary steps to establish itself as a trade union, and that it provided adequate evidence to meet the threshold that would identify it as a trade union pertaining to the construction industry – Certificate granted

PBS GENERAL CONTRACTORS INC. ; RE CANADIAN CONSTRUCTION WORKERS' UNION...(Mar./Apr.) 412

Trade Union – Collective Agreement – Duty of Fair Representation – The six applicants, members of the respondent trade union, CHCW, had filed lay off grievances that were scheduled for arbitration – During a displacement campaign by OPSEU, the members were advised that their grievances would be withdrawn should the members vote for OPSEU – OPSEU was successful and, prior to OPSEU providing a letter to CHCW that OPSEU would act as agent and incur all costs for the grievances, CHCW withdrew the grievances – The Board first found that CHCW's campaign statement--that it would withdraw the grievances--was not a breach of s. 76, since its actions were a reasonable interpretation of its obligations on the loss of representation rights – The Board also found that CHCW's withdrawal of the grievances, prior to hearing from OPSEU, did not breach s. 74 since nothing required a defeated incumbent union to "keep alive" outstanding grievances against the possibility that the incoming union might seek its permission to act as agent with proper cost protection – Accordingly the Board found, in the absence of any obligation by OPSEU to request agency for carriage of the grievances or any reasonable expectation that it would do so, that the withdrawal of the grievances accorded with CHCW's institutional interests and were not a breach of the Act – Finally, once CHCW received OPSEU's letter, the Board found CHCW's failure to take any action to retract its withdrawal could not be a breach of its duty since it could no longer unilaterally accomplish this – Application dismissed

CORPORATION OF THE COUNTY OF GREY OPERATING AS GREY GABLES COUNTY HOME FOR THE AGED, THE; RE PEARL LONG ET AL; RE CANADIAN HEALTH CARE WORKERS UNION ....(May/June) 530

Trade Union – Construction Industry Grievance – In this referral of a grievance filed by OPG concerning the entitlement of former employees to severance payments, the Board addressed the preliminary question whether it had the jurisdiction to hear the grievance, given the Machinists' position that it was not a construction industry trade union – The Board, following *Ontario Hydro*, held that "a history of representing construction employees separate and apart from other employees" must be established for a union to be a construction industry union, and the various union practices relevant in establishing such a history were that a construction trade union usually operates: a hiring hall, an out-of-work list, health, welfare, pension or other benefit plans, either jointly with employers or alone, and a training or apprenticeship program – The Board considered it significant that the members at OPG had exactly the same status within the union as all of the other clearly non-construction members, and had never sought separate status, rights, or representation – There was also no evidence of the Machinists ever having bargained their agreements with OPG or Ontario Hydro together with any building trade unions or as part of a council of such unions, but rather there was direct evidence that the Machinists had always bargained their agreements alone – Although the Machinists/OPG collective agreement did contain certain provisions which were far more common within construction as opposed to non-construction collective agreements, the actual practices of the Machinists were far more in keeping with those of a non-construction union – Ultimately the Board stated that the trade union definition in s. 126, and specifically the words 'pertains to,' should be given a restrictive interpretation in order to accomplish the separation in the Act between construction and non-construction – The Board held that the Machinists were not a construction trade union, and therefore the Board had no jurisdiction to determine this grievance – Grievance dismissed

ONTARIO POWER GENERATION INC.; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS .... (Sept./Oct.) 927

Trade Union Status – Certification – Construction Industry – Reconsideration – The Carpenters sought reconsideration of a Board decision granting the Sheet Metal Workers trade union status (unreported Board decision, June 20, 2007) in eight certification applications – The Carpenters argued that the Board denied them procedural fairness by not allowing them to adduce evidence relating to an earlier finding of status involving different employees and employers – The Board held that it acted properly in refusing the Carpenters the opportunity to lead evidence on the earlier files: first, the Board assumed all of the material facts and particulars pled concerning the earlier applications to be true; secondly, the parties in those matters were not before the Board; and finally, the Sheet Metal Workers had agreed not to rely on those earlier cases, but to establish its trade union status *de novo* – The Board further held that if the Carpenters wished to pursue their allegations of impropriety relating to the earlier files, there were processes available to them for doing so under the Act; the Board specifically did not rule on what effect or consequences any findings of fault in those unfair labour practices might have on the eight certification applications – Matter continues

EASTERN EAVESTROUGHING LTD.; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51; RE CARPENTERS & ALLIED WORKERS LOCAL 27, CJA..(Jul./Aug.) 758

Trades Qualification and Apprenticeship Act – Construction Industry – Jurisdictional Dispute – Remedies – The Ironworkers (IW) applied for a declaration and other relief under s. 99 of the Act in relation to hoisting and rigging of piping equipment weighing in excess of two tons carried out by members of the Plumbers and Pipefitters (UA) – The Board found that the majority of the area practice in respect of the work in dispute, when done by contractors bound by agreements with both unions, was assigned to either members of the IW exclusively or to a composite of UA and IW members – The Board further held that the two trade agreements to which the UA and IW were bound in the area remained in force, as they were not inconsistent with area practice – The Board found there was no material difference in terms of economy or efficiency to have UA rather than IW members perform the small amount of work involved, given that both UA and IW members were employed on the project – The Board rejected the UA's argument that s. 3 of O. Reg. 572/99 under the *Occupational Health and Safety Act* limited the performance of the hoisting and rigging work in question to the plumber and steamfitter trades – In doing so, the Board noted that the work that a plumber or steamfitter does is found in s. 1 of their respective trade regulations under the *Trades Qualification and Apprenticeship Act*, and neither regulation limits hoisting and rigging work to one particular trade – The Board found that included in the scope of the work of an IW is the moving and placing of machinery and heavy equipment, which is required in order to perform the work described in para 1 of the IW Regulation – The Board noted, however, that the work of the trades under the TQAA is not synonymous with a union's work jurisdiction – On the basis of the trade agreements, the Board held that the work was properly assigned to members of the IW – Although no provision of the Act specifically allows for a prospective order regarding work assignment, the Board held that s. 99(5) was broad enough to encompass such a power – The Board declared that the hoisting and rigging work in question should be assigned to IW members, and directed the employer to assign that work to them in future

TESC CONTRACTING COMPANY LTD. AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 800; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 786....................................(Jul./Aug.) 817

Trusteeship – Alteration of Jurisdiction – Construction Industry – Trade Union – After a local union withdrew from various programs of its parent union and took steps to affiliate itself with a rival union, the parent revoked the local's charter – The local claimed that the revocation violated sections 147 and 149 of the *Act* – The Board held that section 149 had no application as the parent did not attempt to retain any of the legal or institutional attributes of the local – A parent union is entitled to sever its relationship with a local, subject only to the just cause requirement of section 147 – The Board is not likely to weigh the merits of the parent's decision as long as it severs the relationship completely and does not do so for a coercive or punitive motive – The revocation of the charter would harm viable and stable collective bargaining and cause serious labour relations problems because (i) no collective agreement would apply to the geographical area under the local's jurisdiction and (ii) it would unravel a previous order made by the Board that prevented the irreconcilable differences between the parties from disrupting the entire construction industry and inflicting significant damage to the economic interests of both employers and members of the union – The parent would not be able to demonstrate just cause for the revocation of the charter unless it simultaneously took steps to transfer the rights, privileges and duties of the local to the employee bargaining agency – The Board found that the parent acted without just cause and declared the attempted revocation to be null and void

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 25 ....(Jan./Feb.) 101

Trusteeship – Conflict of Interest – Judicial Review – In the ongoing dispute involving LIUNA, Local 183 and two of its pre-trusteeship executives, the Board was asked to rule on the conflict of interest of counsel for the two former executives because of his firm's access to or knowledge of confidential information relating to Local 183 – The Board held there was no conflict because the firm possessed no knowledge outside of what it had learned from its clients to support the litigation, and there had been no change in positions or movement of any lawyers from one side of the litigation to the other - On judicial review, on a standard of correctness, the Divisional Court quashed the Board decision, stating that the prejudice to Local 183 must be "approached on an objective basis of perception by a reasonably informed member of the public, as well as within the context of the continuing importance of the duty of client loyalty and confidence of all parties and the public in the administration of justice" – In the Court's view, all the information held by the law firm related to the trusteeship and its litigation – Although no lawyers had changed sides in the dispute, Local 183's stance shifted from opposition to LIUNA to a position allied in interest with the parent – Citing the Supreme Court of Canada in *MacDonald Estate*, the Court held that a "lawyer who has relevant confidential information cannot act against his client or former client" – Application for judicial review allowed

RICHARD WEISS AS TRUSTEE FOR LOCAL 183; RE ONTARIO LABOUR RELATIONS BOARD; RE ANTONIO DIONISIO AND JOHN DIAS .... (Mar./Apr.) 466

Trusteeship – Construction Industry – The Board issued reasons to support its finding of June 12, 2006 that LIUNA properly exerted its rights to impose trusteeship over Local 183, without violating either s. 147 or 149 of the Act – The Board examined the myriad proceedings and events leading up to the imposition of the trusteeship, including the hearing before and determination of the union-appointed Canadian Independent Hearings Officer (the Keller Award) – The Board found that LIUNA had not in any way altered the jurisdiction of 183 in breach of s. 147 – For purposes of s. 149, the Board looked at the Keller Award as well as the materials presented and arguments made before the Board, and held that the three preconditions for issue estoppel (as argued by LIUNA) had been met – The Board specifically refused to rely on supplementary affidavit material filed before it, stating that that evidence could have been presented to Keller but was not – The Board found that it is inconsistent with the core values of both parent and local to expend union funds for surreptitious surveillance to preserve the positions of those in power, or to approve the forgery of collective agreements – Issue estoppel applied – Trusteeship confirmed

UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183 ....(Jan./Feb.) 231

Trusteeship – Interim Relief – Local 31 filed a s. 149 application challenging the imposition of supervision over it by BACU – BACU sought interim relief from the Board to be able to continue its trusteeship because of the Local's alleged failure to resist displacement overtures brought by another union – The Board held that s. 98(1)(a) gave it the authority to do what was necessary to preserve its processes; an interim ruling might well be required to preserve some prevailing conditions for the purpose of being able to adjudicate them – The Board found that BACU had successfully met the three factors necessary for the granting of interim relief: (1) BACU has put forward a defence to the s. 149 complaint that makes out a strong *prima facie* case; (2) the parent union will suffer irreparable harm in that if the relief is not granted, their ability to participate meaningfully in the litigation will be nullified; and (3) the balance of labour relations harm points to maintaining the integrity of the Board's processes until the substantive relief can be adjudicated – Furthermore, Local 31 appeared to have taken the law into its own hands rather than have the Board or the courts deal with its dispute with BACU when it transferred its assets to a new membership trust fund – The Board amended its earlier ruling of April 16, 2007 and refrained from making any order with respect to the trust fund; similarly, it made no determinations with respect to other monies held by the various parties in these proceedings – Interim relief granted

MARBLE, TILE & TERRAZZO, LOCAL 31; RE BRICK AND ALLIED CRAFT UNION; RE KERRY WILSON; RE TOM WILLIAMS; RE JOHN HAGGIS; RE JOE PLUNKETT; RE CAMERON MACKAY; RE FRANK ROCCA......................(May/June) 587

Unfair Labour Practice – Duty of Fair Referral – The employee claimed that the union had breached its duty of fair referral by refusing to readmit him after he had resigned his membership – He alleged that, as a result of this refusal, he was unable to obtain employment under the collective agreements by which Local 675 is bound, including its province-wide ICI agreement – The Board refused to adopt an expansive interpretation of s. 75, which would extend the duty owed by unions beyond the "selection, referral and assignment of persons for employment," to encompass all union decisions, including a decision to not admit someone to membership – The Board noted that this was in keeping with its interpretation of s. 75 over the last 25 years – The Board distinguished the case of a person seeking admission to membership from one of someone who had been expelled – In the case of a person expelled who alleges a breach of s. 75, the duty under that provision is still owed by the union to the point of the expulsion – A person who is not actually a member of the union, however, has no relationship with the union, as they are neither bargaining unit employees nor persons referred to the union by an employer to be name hired – The union cannot owe a duty under s. 75 to a person with whom it has no relationship – Application dismissed

PAUL L. STEWART; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, DRYWALL ACOUSTIC LATHING AND INSULATION, LOCAL 675 ....(Jul./Aug.) 793

Unfair Labour Practice – Certification – Certification where Act Contravened – Construction Industry – Remedies – Representation Vote – The union brought an application for certification and remedial certification under s. 11, alleging that the employer had contravened the Act by terminating a union organizer, thereby preventing the union from being able to demonstrate it had more than 40% membership support – The employer, solely owned by Normoyle, had four employees during the relevant time period – McCarthy, the inside union organizer, was terminated nine days after being hired, and the day after Normoyle discovered there was a union organizing drive – The Board did not accept that McCarthy was fired for performance deficiencies, for being slow in his work and for being late – The Board noted that the employer did not warn or reprimand McCarthy for these matters at the time they occurred, nor was he allowed any opportunity to change – The Board found the totality of the performance issues were of no consequence to Normoyle at the time they occurred because he did not act on them – The Board further found that the timing of the termination, one day after Normoyle discovered that McCarthy was involved in the union organizing the work place, was significant in light of the lack of employer-demonstrated reasons for termination – The Board found that McCarthy was fired because he was behind the union organizing drive and this was a breach of the Act – The Board then turned to the appropriate remedy under s. 11 recognizing that it can only certify without a representation vote where "no other remedy would be sufficient to counter the effects of the contravention" – The Board found that the employees could not freely express their wishes in a representation vote in the context of a discharge of an individual associated with union activity – The employer's actions served two purposes: stopping the union organizer from accessing employees and sending a message to employees that support for the union meant job loss – The Board found that a representation vote with ancillary relief would be insufficient to counter this effect – The union's application under s. 11 was granted and the union was certified – Application granted

1443760 ONTARIO INC. OPERATING AS SWING STAGE EQUIPMENT RENTALS OTTAWA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93...(May/June) 485

Unfair Labour Practice – Certification – Certification Where Act Contravened – Construction Industry – The union sought automatic certification under s. 11 of the Act, alleging that the owners of the respondent company had contravened ss. 70, 72 and 76 – The union alleged that a company owner had phoned and physically threatened the outside union organizer, and a "captive audience" meeting was held during which physical threats against union organizers and threats to job security were made – The Board held that threatening a person who acts on behalf of a union with physical violence was a violation of both ss. 70 and 76 –The Board also held that even though no employee was directly threatened with violence at the meeting, the offer of money by one of the owners to anyone who would punch a union organizer was a suggestion of violence that necessarily has the effect of creating a climate of intimidation – The Board held that that comment was a violation of ss. 70 and 72(c) – The Board held that statements made by the owners at the meeting that the company may lose customers, that the employees would have to drive their own vehicles (rather than company vehicles) at their own expense if they had to work for another employer, and the general statement that there could be job cuts, reductions and lost hours if the union won all constituted threats to job security and amounted to a violation of ss. 70, 72(c) and 76 of the Act – The physical threats and threats to job security created an atmosphere in which employees were unable to express their true wishes "free of the shadow of repercussions by the employer" – Automatic certification granted – Certificate Issued

EAST ELGIN CONCRETE FORMING LIMITED; RE LIUNA, LOCAL 1059 ....(Jul./Aug.) 741

Unfair Labour Practice – Certification – Construction Industry – Reconsideration – The Board was asked to reconsider its dismissal of a certification application; the dismissal was based on the Board's finding that a particular individual was performing bargaining unit work on the application date and was therefore included in the unit, reducing the applicant's requisite support for card-based certification; in a vote, conducted earlier on agreement of the parties, the union had lost – At the reconsideration hearing, the applicant adduced credible evidence that the impugned employee's time card had been altered to show he performed bargaining unit work and not office work, and the applicant only learned of the tampering after the dismissal of the application for certification – The Board found the employer violated s. 70 of the Act –Reconsideration granted, dismissal revoked, certificate issued

KOOL FAB MECHANICAL INC.; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION..(Jul./Aug.) 774

Unfair Labour Practice – Certification – Construction Industry – Remedies – In this request for remedial certification the Board found: First, that the second-in-command asking employees if they had signed cards was intimidatory – Second, that the owner's statements without consequences, actual or intended, do not become unlawful statements simply because an employee overhears them in circumstances where it was not reasonable to expect that employee to overhear them – However, the owner's attempt to conduct surveillance on a meeting being held after hours (and off employer or customer property) for the purposes of discovering who might be interested in the union was improper and was a violation of s. 70 – Third, that a lay-off due to a temporary downturn in work was not tainted by any anti-union animus – This conclusion was supported by the fact that the employee did not actively demonstrate support for the union, and he was not involved in trying to recruit others; further, the employer offered him his job back two weeks later – Fourth, that the lay-off of the union's key inside organizer was in fact a discharge in violation of s. 72 – The Board held that while the employer did contravene the Act, these violations and the termination of the inside organizer, were not so serious that the Board could conclude that section 11 was the only appropriate remedy – Therefore, the Board ordered compensation to the inside organizer and a posting – ULP Application allowed, in part; Certification dismissed

L & L PAINTING AND DECORATING LTD.; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL UNION 557 .... (Sept./Oct.) 887

Unfair Labour Practice – Certification – Construction Industry – Representation Vote – Remedies – The union filed an application for card-based certification as well as an unfair labour practice complaint alleging violations of ss. 70, 72 and 76 of the Act – Because the Board had earlier determined that 40 to 55 percent of the employees in the bargaining unit were members of the union on the date that the application for certification was filed, the Board directed that a representation vote be held and counted forthwith (The union had asked the vote to be deferred until after the ULP was determined) – The Board held that if the union does not obtain 50 percent of the votes cast in the representation vote, s. 11(2) of the Act is still applicable and the unfair labour practice complaint will be heard – Matter continues

DOUBLE H CONCRETE FORMING; RE LIUNA, LOCAL 1059 ....(Nov./Dec.) 1030

Unfair Labour Practice – Certification – Construction Industry – Practice and Procedure – Representation Vote – LIUNA filed membership evidence in excess of 55% in support of this card-based application for certification – The responding party alleged that the union had acted improperly in its collection of membership evidence by assuring the employees they were only signing cards to get a vote and by advising the employees that the employer was supportive of the union – Further, a number of employees wrote to the Board stating that they did not wish to belong to the union, and requesting a representation vote – The Board ruled that the fact an employee signed a membership card but later had a change of heart would be irrelevant to the exercise of its discretion in certifying the union – The Board was concerned, however, about the employer's allegations and considered its options: to certify the union, to order a vote, or to dismiss the application – The Board determined that it should set the matter down for hearing to hear evidence about the allegations attributed to the union's organizers - Matter listed for hearing

HILLSIDE SOD LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ....(Nov./Dec.) 1037

Unfair Labour Practice – Certification – Construction Industry – Membership Evidence – *Prima facie* motion – Practice and Procedure – Representation Vote – The Company alleged that when employees signed membership cards they were confused and/or misled and did not realize what they were signing nor what the membership cards would be used for – First, the Board found that the allegations, even if true, do not breach s. 5 (the section cannot be violated); s. 15 (no particulars of employer domination); s. 70 (a union is not a "person" and was not acting as an "employer", hence it cannot violate the provision); or s. 76 (there was no "intimidation or coercion") – Accordingly, the Board dismissed the s. 96 complaint – Second, the Board found that these circumstances could give rise to the exercise of the Board's discretion to order a vote under s. 128.1(13)(b), even where the Union has more than 55% membership evidence, and accordingly, it dismissed the union's *prima facie* motion on this issue – Finally the Board refused to order disclosure of employee statements since the statements were covered by litigation privilege (collection of information by Company's counsel concerning what employees were doing on the date of application), and the balancing of competing interests also led to that conclusion – That is, since the information recorded in the statements would be given little, if any, weight (they were collected three to five weeks after the date of application), the potential undermining of the adversarial litigation process (by ordering the disclosure) outweighed any potential value that these statements had – Unfair Labour Practice complaint dismissed – Certification application continues

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486......................(Nov./Dec.) 1079

Unfair Labour Practice – Certification – Construction Industry – The employer alleged in post-vote representations that the union had engaged in misconduct that affected the employees' expression of their true wishes – The Board found that: (1) an employee's statement that the union "took care of" him was ambiguous; (2) the provision of travel expenses, overnight accommodation and unlimited food and drinks to the employees by the union to secure the employees' votes did not amount to intimidation or coercion; (3)

the union's offers of premium employment to one of the employees was not improper; (4) a threat to cause an employee's discharge was a type of economic intimidation – Matter set down for hearing to hear *viva voce* evidence on the final allegation

VANSMIT LTD. O/A JAY-DEE CONCRETE FORMING; RE LIUNA, LOCAL 625 .... (Nov./Dec.) 1164

Unfair Labour Practice – Certification – Practice and Procedure – Related Employer – Remedies – The Labourers filed an application to represent the employees of Postma, seeking remedial certification as well as a declaration that Postma and Specific are a single employer – As a further remedy for Postma's alleged unfair labour practice (one of Postma's owners had advocated a preference for CLAC over the Labourers in the days prior to the representation vote), the Labourers asked the Board to terminate CLAC's bargaining rights with Specific – The Board held that the revocation of a union's bargaining rights is an extreme remedy, to be invoked only in the most serious cases of wrongdoing – In the instant case, the Labourers were asking the Board to revoke CLAC's bargaining rights in the absence of any suggestion of wrongdoing by CLAC; CLAC was the innocent beneficiary of wrongdoing committed by Postma – The Board made a preliminary determination that it would not order the termination of CLAC's bargaining rights with Specific – Matter continues

1614818 ONTARIO INC c.o.b. POSTMA CONCRETE FORMING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 53 AFFILIATED WITH CHRISTIAN LABOUR ASSOCIATION OF CANADA .... (Mar./Apr.) 297

Unfair Labour Practice – Certification – Practice and Procedure – CLAC applied to certify the employees of the employer pursuant to s. 128.1 – Six days later the Labourers intervened in the CLAC application, filed a certification application under s. 8, as well as an unfair labour practice against CLAC and the employer – The Board found there was nothing objectionable in CLAC filing a certification that was in part a displacement and in part a fresh application for a group of unrepresented employees – Secondly, since CLAC was unaware of the Labourers' bargaining rights in the ICI sector, the Board held CLAC was not obliged to identify the other union in its application – The Board then considered s. 111(3) of the Act and the factors relevant to its exercise of discretion in applying that section, including: the ability to ascertain the true wishes of the employees; whether there are overlapping bargaining units; the potential complexities of the vote arrangements; the significance of the application date in the construction industry; the desire to avoid protracted litigation; the timing of the second application; the promotion of harmonious labour relations; and the existence of the outstanding unfair labour practice complaint – The Board found that since the Labourers filed their intervention in the CLAC application on the same day as their own certification (and the intervention was found to be timely by a different panel of the Board), and since no significant steps had been taken in the card-based certification at that point, it would exercise its discretion to treat the applications as having been filed on the same day – Matter continues

CONCRETE SYSTEMS INC.; RE CONSTRUCTION WORKERS LOCAL 53, AFFILIATED WITH CHRISTIAN LABOUR ASSOCIATION OF CANADA; RE LIUNA, LOCAL 1089 .... (Jul./Aug.) 722

Unfair Labour Practice – Certification – Remedies – Representation Vote – The union filed membership evidence on behalf of fewer than 40% of the bargaining unit, seeking remedial certification under s. 11 based on its accompanying unfair labour application –

The employer's s. 8.1 notice was conceded to be relevant – The union requested that a vote be held, and the Board found that since a representation vote was one of the possible outcomes under s. 11, it would be preferable to hold the vote as close to the application date as possible – Also there was no need to seal the ballot box since it would not affect the outcome of the notice under s. 8.1 and the results of the vote would be a relevant consideration for the Board in granting relief under section 11 – Representation Vote ordered; matter continues

792844 ONTARIO INC. O/A SECORD CONSTRUCTION LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..(Jul./Aug.) 701

Unfair Labour Practice – Collective Bargaining – Construction Industry – Duty to Bargain in Good Faith – Intervenors – Parties – Three of five constituent member associations of PEBAL filed a complaint alleging the LEBA together with the other two constituent members of PEBAL breached s. 17 of the Act – The applicants allege that LEBA and the two other constituent members, by entering into agreements extending the scope of their appendices and subcontracting provisions, have forced a recognition issue to impasse, since PEBAL cannot adopt an agreement entered into by some members that has a direct negative impact on its other members – The Board found that just as there is no duty to bargain in good faith owed to employees, there is no duty owed to the constituent members of PEBAL – The Board further noted that while it is charged with determining the applications or complaints that are filed with it, the Board must be satisfied the applicants do not just have an interest in the matter, but have the legal right to proceed with the complaint – Here the Board found since there is no duty on LEBA to bargain in good faith with the constituent members of PEBAL, the applicants do not have the legal right to assert that LEBA violated the duty to bargain in good faith owed to PEBAL – Finally the Board characterized this matter as one of a complaint about the manner in which two of the five constituent members of PEBAL have dealt with the other three members (and how LEBA has taken advantage of this schism), and not as one encompassed by s. 17 of the Act – Application dismissed

ONTARIO MASONRY CONTRACTORS ASSOCIATION; RE CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF ONTARIO; RE SEALANT AND WATERPROOFING ASSOCIATION; RE INDUSTRIAL CONTRACTORS ASSOCIATION OF CANADA; RE CONCRETE FLOOR CONTRACTORS ASSOCIATION OF ONTARIO...(May/June) 600

Unfair Labour Practice – Collective Bargaining – Construction Industry – Interference with employers' organization – Intervenors – Parties – Three of five constituent member associations of PEBAL filed a complaint alleging the LEBA together with the other two constituent members of PEBAL interfered in the administration of the employers' organization contrary to s. 71 of the Act – The Board ruled on four preliminary motions raised by the responding parties – First, the Board found that the members of the employers' organization had a direct legal interest in having their organization operate without interference by a trade union and accordingly had standing – Second, the Board declined to determine whether the applicants had pled a *prima facie* case and dismissed the responding parties' motion to dismiss – Third the Board declined to exercise its discretion to refuse to entertain the complaint – Finally, the Board found merit in the responding parties' submissions seeking to defer the matter pending the outcome of an Industrial Inquiry Commission, given that through its mandate the Commission would provide a much better forum for discussing the parties' differences – Adjourned pending release of Commission's report

ONTARIO MASONRY CONTRACTORS ASSOCIATION; RE CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF ONTARIO; RE SEALANT AND WATERPROOFING ASSOCIATION; RE INDUSTRIAL CONTRACTORS ASSOCIATION OF CANADA; RE CONCRETE FLOOR CONTRACTORS ASSOCIATION OF ONTARIO..(May/June) 607

Unfair Labour Practice – Constitutional Law – Interim Relief – Intervenor – Judicial Review – Reference – On a ministerial reference regarding the appointment of a conciliator, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – On judicial review, the Divisional Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the appellant had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the Court held that the Board had the statutory authority to conduct the proceedings as it did – The application for judicial review was dismissed – On appeal, the Court of Appeal noted that – (1) there was still no evidence of an aboriginal practice, custom or tradition that supports the right to enact a distinct Code – (2) such a practice would not be integral to the distinctive culture of the appellant – (3) there was no reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim – The decisions of the Board and Divisional Court were correct – Considering the Crown's duty to consult and accommodate the aboriginal claim, the Court found that meaningful consultation could not have taken place because the appellant had not made known its claim during the unionization drive and certification proceedings – The Court also found that the appellant, rather than the Crown, had taken peremptory and unilateral action which initiated the dispute – The Crown did not breach its duty to consult and accommodate – Appeal dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB ....(Nov./Dec.) 1197

Unfair Labour Practice – Discharge for Union Activity – Interim Relief – The employer laid off 45 of the most junior employees due to a reduction in demand from its sole customer – The employer initially told its employees that they would be recalled by seniority – The employer then told its employees that the lay off would be permanent – Approximately eight months later, the employer recalled three employees – The union argued that one of the laid off employees, a known union organizer, was not recalled according to seniority – The union sought interim reinstatement pursuant to s. 98 of the Act for the 45 laid off employees, according to their seniority and the employer's need – The employer argued that the lay off lasted longer than 13 weeks and the three individuals were new hires – The Board relied on the fact that the union was not actively soliciting support in the form of membership cards and that there was no impending representation vote – The Board held that the union was not in a particularly vulnerable point in its campaign to establish bargaining rights – The Board was not persuaded that the relief was necessary to prevent irreparable harm and accordingly, the union's application did not meet the condition in clause 3 of s. 98(2) of the Act – Interim Relief denied

INTERNATIONAL UNION UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CLC); RE WALLACEBURG PREFERRED PARTNERS CORP....................................(Nov./Dec.) 1174

Unfair Labour Practice – Duty of Fair Representation – Duty to Bargain in Good Faith –These three applications concern (1) an unfair labour practice complaint brought by the union alleging the employer's failure to bargain in good faith; (2) an unfair labour practice complaint launched by individual employees against the employer; and (3) a complaint by the same employees that the trade union had not represented them fairly – Shortly after the union was certified, the employer announced the closure of its transportation division and the permanent lay-off of all the bargaining unit members – The union and employer negotiated, and the employees ratified, a closure agreement rather than a collective agreement – The Board found that the union failed to make out a *prima facie* case of a violation of s. 17 because the parties had reached an "agreement" that was enforceable by way of arbitration – The Board further found that individual employees have no standing to allege violations of s. 17 and 86, and have limited standing (not applicable in the present case) to complain about violations of s. 70 – Allegations of a violation of s. 72 were allowed to proceed, with a direction to the employees for further particulars – Finally, the alleged violation of s. 74 was allowed to proceed as well (in light of the arbitrability of the closure agreement), once again with a direction for further particulars – Matter proceeds

READY BAKE FOODS INC.; RE UNITED FOOD & COMMERCIAL WORKERS CANADA LOCAL 175; RE BRIAN LORENTZ ET AL ....(Jan./Feb.) 166

Unfair Labour Practice – Employee – Interference with Trade Union – Remedies – The collective agreement between the University and YUSA included eligibility to participate in a pension plan and post-retirement benefits – The University, arguing retirees were not employees, refused to provide YUSA with the names and addresses of persons who had retired from the University and had been employed in the bargaining unit represented by YUSA immediately prior to their retirement – The Board did not find it necessary to determine whether retirees were "employees" for at least some purposes of the Act – The Board found as long as it was arguable that YUSA had an obligation or the right to pursue a grievance respecting the continued provision of benefits to retirees in accordance with the collective agreement provisions, the denial of information to it amounted to an interference with its administration, contrary to section 70 – Declaration and direction that information be provided

YORK UNIVERSITY; RE YORK UNIVERSITY STAFF ASSOCIATION....(May/June) 659

Unfair Labour Practice – Fraud – Standing – The Carpenters complained that the Sheet Metal Workers committed a fraud on the Board that led to the Board issuing certificates to the SMW in respect of units of employees engaged in roofing and siding (in *Proaction Aluminum* and *Tops Roofing*) – The SMW subsequently filed other applications for certification seeking to displace the Carpenters – While they initially sought to rely on the trade union status they were awarded in *Proaction* and *Tops*, the SMW led new evidence to establish its status, independent of the earlier applications – The Carpenters sought an order from the Board revoking the earlier certificates and barring the SMW from bringing fresh applications for a period of one year – While the Board expressed its concern for the alleged conduct of the SMW in *Proaction* and *Tops*, it found that the Carpenters had no standing to bring the instant complaint: the Carpenters had no collective agreement with either of these employers, and they could provide no evidence that they had been victims of the fraud and had suffered some loss – Application dismissed

MIKE ABAZA PROACTION ALUMINUM; RE CARPENTERS & ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51; RE EASTERN EAVESTROUGHING LTD.; RE JACKSON ROOFING GTA INC.; RE 413554 ONTARIO LTD. C.O.B. CHOUINARD BROS. ROOFING; RE BURNHAMTHORPE ROOFING; RE DONIA ALUMINUM & ROOFING LTD; RE COLOMBUS ALUMINUM AND ROOFING LTD; RE TRUDEL & SONS ROOFING LTD; RE E.P. SIDING INC.; RE EXPERT EAVESTROUGHING; RE CHOUINARD BROS. ALUMINUM LTD.; RE GIANCOLA ALUMINUM CONTRACTORS LTD.; RE GM EXTERIORS INC.; ASPEN ALUMINUM LTD.; RE GORESKI ROOFING AND LATHING LTD.; RE GTA ALUMINUM INC.; CRO ALUMINUM INC. .... (Sept./Oct.) 898

Unfair Labour Practice – Interim Order – The applicant sought interim reinstatement of five laser operators it alleged were laid off because of their participation in the applicant's organizing drive – The employer argued it had *bona fide* business reasons for the lay-offs, as well as for the choices of individuals it chose to lay off – The Board applied the criteria for interim relief found in s. 98 of the Act – For three of the employees, whom the Board found to be organizers, the Board was not able to conclude that their lay-offs were unrelated to the organizing campaign – For the other two employees, who were supporters but not organizers, the Board again could not conclude the employer's motives were completely unrelated to the union's drive – Interim order granted

CLAYSON STEEL (1988) INC.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) .... (Jan./Feb.) 57

Voluntary Recognition – Bar – Certification – Construction Industry – In an application for certification filed by CUPW, the intervenor, Local 183, claimed that the application was barred because it had a VRA with the responding employer – In reply, CUPW claimed that at the time Local 183 entered into the VRA with the employer there were no employees in the VRA bargaining unit – The Board found that, for the purposes of s. 66, the creation of an employment relationship is critical and is not dependent upon whether work has been performed for the employer as of the date that the VRA was entered into – The Board found that an employment relationship will commence upon the acceptance of a non-conditional employment offer and after the completion of the necessary employment documentation – The Board held that Local 183 and the employer were not required to wait until after the employees had actually commenced work prior to entering into the VRA – There was no reason to set aside the agreement – Matter continues

DISTINCTION SERVICE PLUS INC. ; RE THE CANADIAN UNION OF POSTAL WORKERS (CUPW); RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .... (Sept./Oct.) 855

Voluntary Recognition – Bargaining Rights – Collective Agreement – Reference – Sale of Business – Bingo Press was sold to Arrow which was located in Niagara Falls – The union's collective agreement with Bingo Press was limited in geographic scope to St. Catherines – The employer asked the Board to dismiss the union's sale of business application for failing to plead a *prima facie* case – The Board's determination of the motion would decide the Ministerial reference (whether the minister had the authority to appoint a conciliation officer) and accordingly the reference was joined with the sale of business application – The union took the position that its bargaining rights arose from an oral voluntary recognition agreement or from estoppel – The Board found that the

bargaining rights and collective agreement transferred to Arrow and the only issue was whether the collective agreement applied to Arrow's operation in Niagara Falls – The Board found that only collective agreements transfer on the sale of business, not oral amendments to scope clauses or oral voluntary recognition agreements – The Board found that the estoppel argument failed for two reasons: first there was no clear promise or representation made by Bingo Press and second, there was no detrimental reliance – Accordingly the union's sale of business application was dismissed for failing to prove a *prima facie* case and the Board's advice to the Minister was that he did not have the authority to appoint a conciliation officer – Application dismissed and advice given

BINGO PRESS & SPECIALTY LIMITED/ARROW GAMES (BAZAAR & NOVELTY); RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS' UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 462 .... (Mar./Apr.) 307

Voluntary Recognition Agreement – Build-Up – Certification – Termination – In an application for certification filed by CUPW, the intervenor, LIUNA Local 183, claimed that the application was barred because it had a VRA with the responding employer – In reply, CUPW requested that the Board declare, pursuant to s. 66 of the Act, that Local 183 was not entitled to represent the employees of the bargaining unit at the time it entered into the VRA with the employer – CUPW further submitted that the Board should apply the principle of "build up" in making its determination under s. 66, as only 41% of the workforce was employed by Distinction at the time it entered into the VRA with Local 183 – The Board held that it could only consider whether Local 183 was entitled to represent the employees in the bargaining unit "at the time the agreement was entered into," and therefore build-up had no application under s. 66 – The Board further held that, in the absence of a finding of improper conduct, it generally does not set aside agreements reached by employers and their incumbent unions – Rather, "the Board preserves the labour relations regime and stability that has been established by the parties [as t]his is consistent with the stated purposes of the Act" – Matter continues

DISTINCTION SERVICE PLUS INC.; RE THE CANADIAN UNION OF POSTAL WORKERS; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183.....(Jul./Aug.) 730

Wilful Misconduct – Employment Standards – The employee sought review of an ESO's refusal to issue an Order to Pay – The employer had a written policy which included health and safety requirements – A progressive disciplinary model was used to address an employee's failure to comply with the policy – Upon the employee's third disciplinary notice, he was advised that future violations of the policy could lead to termination – The employee violated the policy a fourth time by altering the scene of, and failing to report, an accident – Video surveillance evidence was considered – The Board assessed the employee's failure to comply with company policy and found his acts amounted to wilful misconduct – Application dismissed

SUPPLY CHAIN MANAGEMENT INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE MUSTAFA DAGINAWALA .... (Sept./Oct.) 973

Wilful Misconduct – Employment Standards – The employer sought review of an ESO's decision that the employee was terminated for exercising his rights under the emergency leave provisions of the ESA – The employer had an Employee Handbook which included policies on absenteeism, lateness and discipline – The employee had three disciplinary infractions within 12 months for "blameworthy" absences – The employee was disciplined a fourth time for missing the first three hours of his shift – The Board found

that the employee's fourth absence was because he had slept in and not because he was caring for his son – The Board held that the employee was not attempting to request or claim an emergency leave, or any other right under the ESA – The Board further held that the employee's fourth absence, while blameworthy, did not constitute wilful misconduct – Order for compensation was reduced to an order to pay termination and severance pay – Application allowed, in part

FAG AEROSPACE INC.; RE CHRIS NEAL AND DIRECTOR OF EMPLOYMENT STANDARDS .... (Sept./Oct.) 866

Work Refusal – Employment Standards – Health and Safety – Reprisal – The employee alleged he was dismissed because he had raised concerns with his employer regarding overtime pay and the safety of a van used in the course of his employment, contrary to s. 74 of the ESA and s. 50 of the OHSA, respectively – The Board held that there was no requirement under s. 50 of the OHSA for the employee to first comply with the Act *and then* seek its enforcement; rather, it is sufficient that the worker acted in compliance with the Act *or* sought its enforcement *or* gave evidence in a proceeding in relation to the enforcement of the Act – The Board held that there was no evidentiary basis for concluding that the employee had raised the subject of the safety of the van with his employer – The evidence revealed that the employee and employer engaged in an argument regarding the effect a diesel leak in the van would have on the employee's license, and this led to his discharge – No issue of overtime was raised during the argument – Application for review of ESO's decision not to issue an order finding a breach of s. 74 of the ESA dismissed – Employer found not to be in breach of s. 50(1) of the OHSA – Matter referred to Field Services to resolve Board's exercise of discretion under s. 50(7) of the OHSA – Matter continues

TRI-GREEN CONSTRUCTION INC.; RE DARRYL HICKEY .... (Jul./Aug.) 831

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